

ENVIRONMENTAL LAW: DEVELOPMENTS IN THE LAW OF SEQRA

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INTRODUCTION

This Article will discuss notable developments in the law relating to the New York State Environmental Quality Review Act (SEQRA) for the *Survey* period of 2017–2018.¹ This year, the New York State Department of Environmental Conservation (DEC) adopted the most significant amendments to SEQRA since 1995. The Court of Appeals issued one case under SEQRA during the *Survey* period, *Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, which upheld the appellate division's decision deferring to the lead agency's assessment regarding the absence of significant construction-related health impacts to schoolchildren.² Lower and intermediate courts issued decisions discussing various legal issues relevant to the SEQRA practitioner—including standing, ripeness, and the statute of limitations; procedural issues, including segmentation and coordinated review; the adequacy of agencies' determinations of significance; the sufficiency of agencies' environmental impact statements and Findings Statements; and supplementation of impact statements.³

Part I of this Article provides a brief overview of SEQRA's statutory and regulatory requirements. Part II reviews the SEQRA amendments DEC adopted on June 27, 2018. Part III discusses the more important of the numerous SEQRA decisions issued during the *Survey* period.

1. The *Survey* period covered in this Article is July 1, 2017 to June 30, 2018. A prior *Survey* addresses SEQRA developments in the first half of 2017. See Mark A. Chertok et al., *2016–17 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 68 SYRACUSE L. REV. 837, 837 (2018).

2. 30 N.Y.3d 416, 433, 90 N.E.3d 1253, 1262, 68 N.Y.S.3d 382, 391 (2017) (quoting *Akpan v. Koch*, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990)).

3. See *infra* Part III.

I. SUMMARY OVERVIEW OF SEQRA

SEQRA requires governmental agencies to consider the potential environmental impacts of their actions prior to rendering certain defined discretionary decisions, called “actions.”⁴ “The primary purpose of SEQRA is ‘to inject environmental considerations directly into governmental decision making.’”⁵ The law applies to discretionary actions by New York State, its subdivisions, or local agencies that have the potential to impact the environment, including direct agency actions, funding determinations, promulgation of regulations, zoning amendments, permits, and other approvals.⁶ SEQRA charges DEC with promulgating general SEQRA regulations, but it also authorizes other agencies to adopt their own regulations and procedures, provided that those regulations and procedures are consistent with and “no less protective of environmental values” than those DEC issues.⁷

A primary component of SEQRA is the Environmental Impact Statement (EIS), which—if its preparation is required—describes the proposed action, assesses its reasonably anticipated significant adverse impacts on the environment, identifies practicable measures to mitigate such impacts, discusses unavoidable significant adverse impacts, and evaluates reasonable alternatives that achieve the same basic objectives as the proposal.⁸

Actions are grouped into three categories in DEC’s SEQRA

4. SEQRA is codified at N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2017); see Mark A. Chertok & Ashley S. Miller, *2007–08 Survey of New York Law: Environmental Law: Climate Change Impact Analysis in New York Under SEQRA*, 59 SYRACUSE L. REV. 763, 764 (2009).

5. *Akpan*, 75 N.Y.2d at 569, 554 N.E.2d at 56, 555 N.Y.S.2d at 19 (1990) (quoting *Coca-Cola Bottling Co. v. Bd. of Estimate*, 72 N.Y.2d 674, 679, 532 N.E.2d 1261, 1263, 536 N.Y.S.2d 33, 35 (1988)). For a useful overview of the substance and procedure of SEQRA, see *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 415–16, 494 N.E.2d 429, 434–35, 503 N.Y.S.2d 298, 303–04 (1986) (first citing *Henrietta v. Dep’t of Env’tl. Conservation*, 76 A.D.2d 215, 220, 430 N.Y.S.2d 440, 445 (4th Dep’t 1980); then citing ENVTL. CONSERV. § 8-0109(2); then citing 6 N.Y.C.R.R. §§ 617.11–617.13 (2018); then citing ENVTL. CONSERV. § 8-0109(4); then citing 6 N.Y.C.R.R. § 617.8(b)–(c); then citing *id.* 6 N.Y.C.R.R. § 617.10(d)–(e); then citing 6 N.Y.C.R.R. § 617.8(d); then citing 6 N.Y.C.R.R. § 617.10(f); then citing 6 N.Y.C.R.R. § 617.8(c); then citing *id.* § 617.8(e); then citing *id.* § 617.8(f); then citing 6 N.Y.C.R.R. § 617.10(g)–(h); then citing 6 N.Y.C.R.R. § 617.9(a) (2018); and then citing *id.* § 617.9(c)–(d)).

6. See 6 N.Y.C.R.R. § 617.2(b)–(c) (2018) (defining actions and agencies subject to SEQRA).

7. ENVTL. CONSERV. § 8-0113(1), (3); 6 N.Y.C.R.R. § 617.14(b) (2018).

8. 6 N.Y.C.R.R. § 617.9(b)(1)–(2), (5). These provisions remain unchanged by the amendments. 40 N.Y. Reg. 9 (July 18, 2018) (to be codified at 6 N.Y.C.R.R. §§ 617.2, 617.4–617.10, 617.17, 617.19–617.20).

regulations: Type I, Type II, or Unlisted.⁹ Type I actions are specifically enumerated and are more likely to require the preparation of an EIS.¹⁰ Type II actions, also specifically enumerated, include only those actions that have been determined not to have the potential for a significant impact and are thus not subject to review under SEQRA.¹¹ Unlisted actions are not enumerated, and are a catchall of those actions that are neither Type I nor Type II.¹² In practice, the vast majority of actions are Unlisted.¹³

Before undertaking an action (except for a Type II), an agency must determine whether the proposed action may have one or more significant adverse environmental impacts, called a “determination of significance.”¹⁴ To reach its determination of significance, the agency must prepare an environmental assessment form (EAF).¹⁵ For Type I actions, preparation of a “full EAF” is required, whereas for Unlisted actions, project sponsors may opt to use a “short EAF” instead.¹⁶ While

9. ENVTL. CONSERV. § 8-0113(2)(c)(i) (requiring DEC to identify Type I and Type II actions); 6 N.Y.C.R.R. § 617.2(ai)–(ak) (2018). Re-designated as § 617.2(aj)–(al) pursuant to the amendments effective Jan. 1, 2019. 40 N.Y. Reg. at 9.

10. 6 N.Y.C.R.R. § 617.4(a) (2018) (Type I actions). This presumption may be overcome, however, if an environmental assessment demonstrates the absence of significant, adverse environmental impacts. *Id.* § 617.4(a)(1); *see, e.g.,* Hell’s Kitchen Neighborhood Ass’n v. City of New York, 81 A.D.3d 460, 461–62, 915 N.Y.S.2d 565, 567 (1st Dep’t 2011).

[W]hile Type I projects are presumed to require an EIS, an EIS is not required when, as here, following the preparation of a comprehensive Environmental Assessment Statement (EAS), the lead agency establishes that the project is not likely to result in significant environmental impacts or that any adverse environmental impacts will not be significant.

Id. It is commonplace for a lead agency to determine that a Type I action does not require an EIS. *See id.*

11. 6 N.Y.C.R.R. § 617.5(a) (2018) (Type II actions).

12. 6 N.Y.C.R.R. § 617.2(ak). Re-designated as § 617.2(al) pursuant to the amendments effective Jan. 1, 2019. 40 N.Y. Reg. at 9.

13. N.Y. STATE DEP’T OF ENVTL. CONSERVATION, THE SEQR HANDBOOK 3 (4th ed. 2019) [hereinafter SEQR HANDBOOK], http://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf.

14. 6 N.Y.C.R.R. §§ 617.6(a)(1)(i), 617.7 (2018). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9.

15. 6 N.Y.C.R.R. § 617.6(a)(2)–(3). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9.

16. 6 N.Y.C.R.R. §§ 617.6(a)(2)–(3), 617.20 (2018). Sections 617.6(a)(2)–(3) remain the same; section 617.20 has been updated to reflect that the model forms will be revised in conformance with the amendments. 40 N.Y. Reg. at 9. *See infra* note 18 (providing that the project sponsor prepares the factual elements of an EAF (Type I), whereas the agency completes Type II, which addresses the significance of potential adverse environmental impacts, and discussing Type III, which constitutes the agency’s determination of

the short and full EAFs ask for similar information, the full EAF is an expanded form that is used for Type I actions or other actions when a greater level of documentation and analysis is appropriate.¹⁷ SEQRA regulations provide models of each form,¹⁸ but allow that the forms “may be modified by an agency to better serve it in implementing SEQR[A], provided the scope of the modified form is as comprehensive as the model.”¹⁹ Where multiple decision-making agencies are involved, there is usually a “coordinated review” with these “involved agencies” pursuant to which a designated lead agency makes the determination of significance.²⁰ A coordinated review is required for Type I actions,²¹ and the issuance of a negative declaration in a coordinated review binds other involved agencies.²²

If the lead agency “determine[s] either that there will be no adverse environmental impacts or that the . . . impacts will not be significant[,]” no EIS is required, and instead the lead agency issues a negative declaration.²³ If the answer is affirmative, the lead agency may in certain cases impose conditions on the proposed action to sufficiently mitigate the potentially significant adverse impacts²⁴ or, more commonly, the lead

significance).

17. 6 N.Y.C.R.R. §§ 617.6(a)(2)–(3), 617.20.

18. See 40 N.Y. Reg. at 9 (establishing model EAFs: “Appendices A and B are model environmental assessment forms that may be used to help satisfy this Part or may be modified in accordance with sections 617.2(m) and 617.14 of this Part”). DEC also maintains EAF workbooks to assist project sponsors and agencies in using the forms. See *Environmental Assessment Form (EAF) Workbooks*, DEP’T ENVTL. CONSERVATION, <http://www.dec.ny.gov/permits/90125.html> (last visited Jan. 20, 2019).

19. 6 N.Y.C.R.R. § 617.2(m) (2018). This provision remains unchanged by the amendments. 40 N.Y. Reg. at 9. New York City, which implements SEQRA under its City Environmental Quality Review (see discussion *infra*), uses an Environmental Assessment Statement, or EAS, in lieu of an EAF. See, e.g., *Hell’s Kitchen Neighborhood Ass’n*, 81 A.D.3d at 461–62, 915 N.Y.S.2d at 567.

20. 6 N.Y.C.R.R. § 617.6(b)(2)(i), (b)(3)(i)–(ii). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9.

21. 6 N.Y.C.R.R. § 617.4(a)(2) (2018). This provision remains unchanged by the amendments. 40 N.Y. Reg. at 9.

22. 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.6(b)(3)(iii). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9.

23. 6 N.Y.C.R.R. § 617.7(a)(2), (d). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9.

24. 6 N.Y.C.R.R. §§ 617.2(h), 617.7(d)(2)(i) (2018). These provisions remain unchanged by the amendments. 40 N.Y. Reg. at 9. This is known as a conditioned negative declaration (CND). 6 N.Y.C.R.R. § 617.2(h). For a CND, the lead agency must issue public notice of its proposed CND and, if public comment identifies “potentially significant adverse environmental impacts that were not previously” addressed or were inadequately addressed, or indicates the mitigation measures imposed are substantively deficient, an EIS must be prepared. 6 N.Y.C.R.R. § 617.7(d)(1)(iv), (2)(i), (3). CNDs cannot be issued for Type I actions or where there is no applicant. See *id.* § 617.7(d)(1). “In practice, CNDs are not

agency issues a positive declaration requiring the preparation of an EIS.²⁵

If an EIS is prepared, typically the first step is scoping the contents of the Draft EIS (DEIS).²⁶ Effective January 1, 2019, under the 2018 SEQRA amendments discussed below in Part II, scoping is now mandatory for all EISs, except for supplemental EISs.²⁷ Scoping involves focusing the EIS on relevant areas of environmental concern, generally through circulation of a draft scoping document and a public meeting with respect to the proposed scope, with the goal (not often achieved) of eliminating inconsequential subject matters.²⁸ The draft scope, once prepared by a project sponsor and accepted as adequate and complete by the lead agency (and in some circumstances the project sponsor, when an agency, may also be the lead agency), is then circulated for public and other agency review and comment.²⁹ As discussed below in Part II, the project sponsor now must incorporate the information submitted during the scoping process into the DEIS.³⁰

A DEIS must include an alternatives analysis comparing the proposed action to a “range of reasonable alternatives . . . that are feasible, considering the objectives and capabilities of the project sponsor.”³¹ This analysis includes a “no action alternative,” which

favored and not frequently employed.” Mark A. Chertok et al., *2015–16 Survey: Environmental Law: Developments in the Law of SEQRA*, 67 SYRACUSE L. REV. 897, 901 n.27 (2017).

25. SEQR HANDBOOK, *supra* note 13, at 83; 6 N.Y.C.R.R. § 617.2(n). This provision remains unchanged by the amendments. 40 N.Y. Reg. at 9; *see* 6 N.Y.C.R.R. § 617.7(a) (explaining when an EIS is required). This provision remains unchanged by the amendments. 40 N.Y. Reg. at 9.

26. *See* SEQR HANDBOOK, *supra* note 13, at 108.

27. *Id.*; 40 N.Y. Reg. at 9 (to be codified at 6 N.Y.C.R.R. § 617.8). Scoping is governed by 6 N.Y.C.R.R. § 617.8, under both the regulations from 2018 and the amendments taking effect Jan. 1, 2019. *Id.*

28. 6 N.Y.C.R.R. § 617.8(a), (e) (2018). Under the amendments taking effect Jan. 1, 2019, the current subsection (e) has been redesignated as subsection (d). *See* N.Y. STATE DEP’T OF ENVTL. CONSERVATION, REVISED DRAFT EXPRESS TERMS OF PROPOSED AMENDMENTS TO 6 N.Y.C.R.R. PART 617, at 26 (2019) [hereinafter EXPRESS TERMS], http://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fnlexptrms.pdf.

29. 40 N.Y. Reg. at 11 (to be codified at 6 N.Y.C.R.R. § 617.8(b)–(d)). Under the amendments taking effect Jan. 1, 2019, the current subsections (d) (requiring involved agencies to provide comments on the draft scope) and (e) (requiring public participation in the scoping process), have been respectively redesignated as subsections (c) and (d). *See* EXPRESS TERMS, *supra* note 28, at 26.

30. 40 N.Y. Reg. at 11 (to be codified at 6 N.Y.C.R.R. § 617.8(g)). Under the amendments taking effect Jan. 1, 2019, the current subsection (h) has been redesignated as subsection (g). *See* EXPRESS TERMS, *supra* note 28, at 27.

31. 6 N.Y.C.R.R. § 617.9(b)(5)(v) (2018). This provision remains unchanged by the amendments. *See* 40 N.Y. Reg. at 9. For private applicants, alternatives might reflect different configurations of a project on the site. 6 N.Y.C.R.R. § 617.9(b)(5)(v). They also might include

evaluates the “changes that are likely to occur . . . in the absence of the proposed action” and generally constitutes the baseline against which project impacts are assessed.³²

In addition to “analyz[ing] the significant adverse impacts and evaluat[ing] all reasonable alternatives,”³³ the DEIS should include an assessment of “impacts only where they are relevant and significant,” which the SEQRA regulations, as updated by the June 2018 Amendments, define as:

- (a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts;
- (b) those adverse environmental impacts that cannot be avoided or adequately mitigated if the proposed action is implemented;
- (c) any irreversible and irretrievable commitments of environmental resources that would be associated with the proposed action should it be implemented;
- (d) any growth-inducing aspects of the proposed action;
- (e) impacts of the proposed action on the use and conservation of energy . . . ;
- (f) impacts of the proposed action on solid waste management and its consistency with the state or locally adopted solid waste management plan; [and] . . .
- (i) measures to avoid or reduce both an action’s impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.³⁴

Although not required, the lead agency typically holds a legislative hearing with respect to the DEIS.³⁵ That hearing may be, and often is,

different sites if the private applicant owns other parcels. *Id.* The applicant should identify alternatives that might avoid or reduce environmental impacts. SEQR HANDBOOK, *supra* note 13, at 105; 6 N.Y.C.R.R. § 617.9(b)(5)(v).

32. 6 N.Y.C.R.R. § 617.9(b)(5)(v). “The ‘no action alternative’ does not necessarily reflect current conditions, but rather the anticipated conditions without the proposed action.” Chertok et al., *supra* note 24, at 902 n.36. In New York City, where certain development is allowed as-of-right (and does not require a discretionary approval), the no action alternative would reflect any such developments as well as other changes that could be anticipated in the absence of the proposed action. *See Uptown Holdings, LLC v. City of New York*, 77 A.D.3d 434, 436, 908 N.Y.S.2d 657, 660 (1st Dep’t 2010) (citing 6 N.Y.C.R.R. § 617.9(b)(5)(v)).

33. 6 N.Y.C.R.R. § 617.9(b)(1). This provision remains unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

34. 6 N.Y.C.R.R. § 617.9(b)(5)(iii)(a)–(f), (i). As discussed in Part II, *infra*, subsection (i) was added to require consideration of measures to reduce an action’s impacts on climate change and its effects.

35. *Id.* § 617.9(a)(4).

combined with other hearings required for the proposed action.³⁶ The next step is the preparation of a Final EIS (FEIS), which addresses any project changes, new information and/or changes in circumstances, and responds to all substantive comments on the DEIS.³⁷ After preparation of the FEIS, and prior to undertaking or approving an action, each acting (i.e., involved) agency must issue findings that the provisions of SEQRA (as reflected in DEC's implementing regulations) have been met and, "consider[ing] the relevant environmental impacts, facts and conclusions disclosed in the [F]EIS," must "weigh and balance relevant environmental impacts with social, economic and other considerations."³⁸ The agency must then

certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.³⁹

The substantive mitigation requirement of SEQRA is an important feature of the statute—a requirement notably absent from SEQRA's parent federal statute, the National Environmental Policy Act (NEPA).⁴⁰

For agency actions that are "broader and more general than site or project specific" decisions, SEQRA regulations provide that agencies may prepare a Generic EIS (GEIS).⁴¹ Preparation of a GEIS is appropriate if: (1) "a number of separate actions in [an] area, if considered singly, may have minor impacts, but if considered together may have significant impacts"; (2) the agency action consists of "a sequence of actions" over time; (3) separate actions under consideration may have "generic or common impacts"; or (4) the action consists of an "entire program

36. 6 N.Y.C.R.R. § 617.3(h) (2018) ("Agencies must . . . provid[e], where feasible, for combined or consolidated proceedings . . .").

37. 6 N.Y.C.R.R. § 617.11(a). This provision remains unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

38. *Id.* § 617.11(a), (d)(1)–(2), (4). These provisions remain unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

39. *Id.* § 617.11(d)(5). This provision remains unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

40. *See* 42 U.S.C. § 4321 (2018) (establishing federal responsibilities for protecting and enhancing the quality of the environment); *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 415, 494 N.E.2d 429, 434, 503 N.Y.S.2d 298, 303 (1986) (quoting Philip H. Gitlen, *The Substantive Impact of the SEQRA*, 46 ALB. L. REV. 1241, 1248 (1982)).

41. 6 N.Y.C.R.R. § 617.10(a) (2018). This provision remains unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

[of] . . . wide application or restricting the range of future alternative policies or projects”⁴² GEISs frequently relate to common or program-wide impacts and set forth criteria for when supplemental EISs will be required for site-specific or subsequent actions following approval of the initial program.⁴³

The City of New York (the “City”) has promulgated separate regulations implementing the City’s and City agencies’ environmental review process under SEQRA, which is known as City Environmental Quality Review (CEQR).⁴⁴ As previously explained, SEQRA grants agencies and local governments the authority to supplement DEC’s general SEQRA regulations by promulgating their own.⁴⁵ Section 192(e) of the New York City Charter delegates that authority to the City Planning Commission.⁴⁶ In addition, to assist “city agencies, project sponsors, [and] the public” in navigating and understanding the CEQR process, the City Mayor’s Office of Environmental Coordination has published the *CEQR Technical Manual*.⁴⁷ First published in 1993, the manual, as now revised, is about 800 pages long and provides an extensive explanation of CEQR legal procedures; methods for evaluating various types of environmental impacts, such as transportation (traffic, transit and pedestrian), air pollutant emissions, noise, socioeconomic effects, and historic and cultural resources; and identifying thresholds for

42. 6 N.Y.C.R.R. § 617.10(a)(1)–(4). These provisions remain unchanged by the amendments. *See* 40 N.Y. Reg. at 9.

43. 6 N.Y.C.R.R. § 617.10(c). This provision remains unchanged by the amendments and requires GEISs to set forth such criteria for subsequent SEQRA compliance. *See* 40 N.Y. Reg. at 9–10.

44. CEQR regulations are contained in RULES OF THE CITY OF NEW YORK, tit. 43, ch. 6 and tit. 62, ch. 5 (2018).

45. N.Y. ENVTL. CONSERV. LAW § 8-0113(1), (3) (McKinney 2017). That authority extends to the designation of specific categories of Type I and Type II actions. 6 N.Y.C.R.R. §§ 617.4(a)(2), 617.5(b), 617.14(e) (2018). These provisions remain unchanged by the amendments except for § 617.5(b), which retains its existing text but adds: “The fact that an action is identified as a Type II action in an agency’s procedures does not mean that it must be treated as a Type II action by any other involved agency not identifying it as a Type II action in its procedures.” 6 N.Y.C.R.R. § 617.5(b) (2019).

46. N.Y.C. CHARTER § 192(e) (2018); *see* RULES OF THE CITY OF NEW YORK, tit. 62 § 5.01 (2018).

47. N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CITY ENVIRONMENTAL QUALITY REVIEW TECHNICAL MANUAL 1 (2014), http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_technical_manual.pdf. Limited revisions were added to the manual in 2016 to incorporate changes to the City’s Waterfront Revitalization Program related to climate change. N.Y.C. MAYOR’S OFFICE OF ENVTL. COORDINATION, CEQR TECHNICAL MANUAL 2014 EDITION REVISIONS 1 (2016) [hereinafter 2016 CEQR REVISIONS], http://www.nyc.gov/html/oec/downloads/pdf/2014_ceqr_tm/2014_ceqr_tm_revisions_04_27_2016.pdf.

both detailed studies and significance.⁴⁸

II. REGULATORY DEVELOPMENTS

In June 2018, DEC adopted the most significant changes to its regulations since implementing SEQRA in more than twenty years. These amendments are designed to streamline the environmental review process without sacrificing meaningful environmental review.⁴⁹ The regulations are also meant to align SEQRA with state initiatives, including the advancement of renewable energy and green infrastructure, and the consideration of climate change impacts.⁵⁰

A. Changes to The Type I List (6 N.Y.C.R.R. § 617.4)

The Type I list saw several additions as a result of the 2018 amendments, which are effective as of January 1, 2019. Two changes expanded the Type I list while the other narrowed the definition. First, the amendments lowered the threshold for construction of new residential units.⁵¹ Specifically, for localities with 150,000 persons or less, the threshold was lowered from 250 to 200 units; for localities with greater than 150,000 persons but fewer than 1,000,000, the threshold was lowered from 1,000 to 500 units; and for localities of 1,000,000 persons or more, the threshold was lowered from 2,500 to 1,000 units.⁵² The amendments also created a Type I parking threshold for smaller communities, which did not previously exist.⁵³

In addition, the threshold for designating Unlisted actions as Type I actions, due to their proximity to historic resources, now covers only those Unlisted actions that exceed twenty-five percent of Type I thresholds (instead of all Unlisted actions), making it consistent with the

48. See 2016 CEQR REVISIONS, *supra* note 47, at 1.

49. 40 N.Y. Reg. 9 (July 18, 2018) (to be codified at 6 N.Y.C.R.R. § 617).

50. N.Y. STATE DEP'T ENVTL. CONSERVATION, STATE ENVTL. QUALITY REVIEW ACT: FINDINGS STATEMENT FOR AMENDMENTS TO 6 N.Y.C.R.R. § 617 (2018), at 1 (2018).

51. 40 N.Y. Reg. at 9.

52. *Id.* According to the Final GEIS, the previous thresholds were established in a 1978 rulemaking with minimal documentation. See DEC, FINAL GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE REGULATIONS THAT IMPLEMENT THE STATE ENVTL. QUALITY REVIEW ACT 5 (2018) [hereinafter FGEIS], https://www.dec.ny.gov/docs/permits_ej_operations_pdf/617fgeis2018.pdf.

53. 40 N.Y. Reg. at 10 (limiting the existing parking of 1,000 vehicles to localities with a population of more than 150,000 persons and creating a threshold of parking for 500 vehicles for localities with 150,000 persons or fewer). The FGEIS recognized that parking lots are rarely constructed as stand-alone developments, and that “[t]he number of parking spaces is a surrogate used in the SEQR process for establishing the level of potential for impact from development proposals,” because DEC uses parking lot size as a measure of development size. FGEIS, *supra* note 52, at 11–13.

threshold that applies to other Unlisted actions.⁵⁴ This provision applies to projects that are in close proximity to both listed properties and those that have been determined to be eligible for listing on the State Register of Historic Places.⁵⁵

B. Changes to The Type II List (6 N.Y.C.R.R. § 617.5)

The June 2018 amendments expanded the list of Type II activities—those activities exempt from SEQRA⁵⁶—to include the following: (1) upgrade of an existing building to meet energy codes;⁵⁷ (2) retrofit of an existing structure and its appurtenant areas to incorporate green infrastructure;⁵⁸ (3) installation of telecommunication cables in existing highway or utility rights of way utilizing trenchless burial or aerial placement on existing poles;⁵⁹ (4) conveyances of land in connection with the construction or expansion of a single-family, two-family or three-family residences;⁶⁰ (5) installation of solar energy arrays involving twenty-five acres or less of physical alteration on certain sites;⁶¹ (6) installation of solar energy arrays on existing structures, provided the

54. 40 N.Y. Reg. at 11.

55. *Id.* at 12. This approach mirrors that used in the National Historic Preservation Act, which accords protection to both properties that are listed on the National Register of Historic Places and those that are eligible for listing. *See, e.g.*, 54 U.S.C. § 306108 (2018) (requiring federal agencies to consider the effect of a federal undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register).

56. 40 N.Y. Reg. at 9.

57. *Id.*

58. *Id.* The June 2018 amendments also added a definition of “green infrastructure” to include specific storm water measures. *See id.* at 12. In response to public comment, DEC opted to make the definition exclusive. FGEIS, *supra* note 52, at 31–37.

59. 40 N.Y. Reg. at 9.

60. *Id.*

61. 6 N.Y.C.R.R. § 617.5(c)(14) (2018) (specifying application at (i) closed landfills, (ii) sites with a Brownfield Cleanup Program or Environmental Restoration Project certificate of completion with a commercial or industrial allowable use, (iii) sites with an inactive hazardous waste disposal (or state superfund) full liability release or certificate of completion with commercial or industrial allowable use, (iv) currently disturbed areas at publicly-owned wastewater treatment facilities, (v) currently disturbed areas at zoned industrial sites, and (vi) parking lots or garages). The regulations specify that a site owner must notify DEC of a change of use before making such changes. *Id.* In response to comments on the draft regulations that its originally-proposed language might inadvertently permit development of greenfield sites as a Type II action, DEC specified that “currently disturbed” areas were construed to include “existing buildings/structures, parking lots, grassed areas that are maintained as lawn, or other maintained areas, e.g., gravel or concrete pad storage or work areas.” FGEIS, *supra* note 52, at 55. Further, in response to concerns regarding landfill caps, DEC explained that DEC would continue its ongoing regulatory control over closed landfills, and that installation of solar energy arrays would require prior DEC approval to prevent technical conflicts between the solar system and the landfill or any applicable engineering controls. *Id.* at 58–59.

structure is not listed on or located within a district in the National or State Register of Historic Places, or determined to be eligible for or within a district eligible for listing on the National or State Register of Historic Places;⁶² (7) granting of lot line adjustments;⁶³ (8) reuse of an existing residential or commercial structure, or of a structure containing mixed residential and commercial uses;⁶⁴ (10) recommendations of a county or regional planning entity;⁶⁵ (11) acquisition and dedication of twenty-five or fewer acres of land for parkland, or dedication of parkland that was previously acquired, or acquisition of a conservation easement;⁶⁶ (12) sale and conveyance of real property by public auction pursuant to Article 11 of the Real Property Tax Law;⁶⁷ and (13) construction and operation of anaerobic digestors at publicly-owned landfills.⁶⁸ The expansion of the Type II list is intended to allow agencies to focus efforts on projects with a greater potential for significant adverse environmental impacts, and to advance some of New York State's initiatives, including the goals of the "Reforming the Energy Vision" that serve to reduce the State's dependence on fossil fuels.⁶⁹

C. Imposition of Mandatory Scoping Requirements (6 N.Y.C.R.R. § 617.9)

The 2019 amendments also made the scoping of EISs mandatory; previously, scoping had been an optional component of the SEQRA

62. 6 N.Y.C.R.R. § 617.5(c)(15).

63. *Id.* § 617.5(c)(16).

64. *Id.* § 617.5(c)(18) (specifying where residential or commercial use is a permitted use under the applicable zoning law or ordinance, and where such action does not meet or exceed any thresholds in § 617.4). The FGEIS acknowledges that "a common phrase among green building advocates is 'the greenest building is the one that isn't built.'" FGEIS, *supra* note 52, at 92.

65. 6 N.Y.C.R.R. § 617.5(c)(19). The FGEIS explained that county planning board recommendations are advisory and were not previously subject to SEQRA, but that such codification would bring greater certainty to the law. *See* FGEIS, *supra* note 52, at 96.

66. 6 N.Y.C.R.R. § 617.5(c)(39). DEC reduced the acreage to twenty-five acres from one hundred acres, which had been previously proposed. *See* FGEIS, *supra* note 52, at 98–99.

67. 6 N.Y.C.R.R. § 617.5(c)(40).

68. *Id.* § 617.5(c)(41) (limited to currently disturbed areas at an operating publicly-owned landfill, provided the digester's feedstock capacity is under 150 wet tons per day, and produces Class A digestate that can be used or biogas to generate electricity or to make vehicle fuel, or both). The FGEIS explains that diversion of food waste, which accounts for approximately eighteen percent of the waste stream in the United States, could help diminish landfill waste while creating useful byproducts. *See* FGEIS, *supra* note 52, at 111.

69. *Id.* at 51; N.Y.S. DEP'T OF PUB. SERV., REFORMING THE ENERGY VISION 1–2 (2014), [https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/26be8a93967e604785257cc40066b91a/%24FILE/ATTK0J3L.pdf/Reforming%20The%20Energy%20Vision%20\(REV\)%20REPORT%204.25.%2014.pdf](https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/26be8a93967e604785257cc40066b91a/%24FILE/ATTK0J3L.pdf/Reforming%20The%20Energy%20Vision%20(REV)%20REPORT%204.25.%2014.pdf).

process.⁷⁰ DEC explained that the intent of imposing the mandatory scoping requirement is to allow for issue identification to occur through a public scoping process and to determine which specific impacts require further study in the DEIS.⁷¹ DEC's hope was that this policy would reduce the "clutter" frequently included in EISs (due to project sponsors' desire to "bullet proof" the EIS) and allow for better focus and depth of analysis on the truly important and potentially significant adverse impacts.⁷²

Another DEC objective in imposing mandatory scoping was to "place more emphasis on identifying issues earlier on in the SEQR process through the EAF and scoping and to draw a tighter connection between the two."⁷³ The amendment made more specific reference to the EAF in describing the requirements for the final written scope,⁷⁴ and also clarified that the project sponsor must incorporate responses to late-filed comments in the body of its DEIS, or else attach comments as an appendix of the DEIS to be treated as public comment for later response in the FEIS.⁷⁵ Based on public comments submitted during DEC's consideration of the proposed amendments, DEC ultimately determined that it would not require mandatory scoping for supplemental EISs because the existing applicable regulation, 6 N.Y.C.R.R. § 617.9(a)(7), already sets out a form of scope for the supplemental EIS that is narrower than the underlying EIS.⁷⁶

DEC declined to make public hearings a de facto required component of the scoping process, and instead requires that scoping "must include an opportunity for public participation. The lead agency may either provide a period of time for the public to review and provide written comments on a draft scope or provide for public input through the use of meetings, exchanges of written material, or other means."⁷⁷

70. 6 N.Y.C.R.R. § 617.8 (2018).

71. FGEIS, *supra* note 52, at 125.

72. *Id.* at 124.

73. *Id.*

74. 6 N.Y.C.R.R. § 617.8(e).

75. *Id.* § 617.8(g). The FGEIS explains that this change is to address issues raised after scoping is complete but before a draft EIS is submitted. Comments must still meet the requirements set forth in § 617.8(f), and DEC warns that "[t]he revision is not intended to encourage opposition groups to sandbag project sponsors with very late filed repetitive comments." See FGEIS, *supra* note 52, at 125.

76. See FGEIS, *supra* note 52, at 121; 6 N.Y.C.R.R. § 617.9(a)(7)(i) (2018) ("The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS . . ."); *Id.* § 617.9(a)(7)(iii) ("If a supplement is required, it will be subject to the full procedural requirements of subdivision (a) of this section except that scoping is not required.").

77. 6 N.Y.C.R.R. § 617.8(d). This is akin to the NEPA regulations promulgated by the

Scoping is now often used by lead agencies, with the same objective of eliminating superfluous discussions and analyses in the EIS. It is unknown whether making scoping mandatory will have the salutary effect of reducing unnecessary paperwork and somewhat streamlining the EIS process.

D. Revisions to Filing, Publication and Distribution Requirements to Include Scoping (6 N.Y.C.R.R. § 617.12)

A further change to the scoping regulations added public notification requirements to provide greater opportunity for public participation. SEQRA now imposes public notification requirements for the draft and final scopes in the Environmental Notice Bulletin, as well as a requirement that lead agencies post the draft and final scopes on websites available to the public free of charge.⁷⁸

E. Updates to The Preparation and Content of EISs (6 N.Y.C.R.R. § 617.9)

A further change to the scoping regulations clarified what it means for a DEIS to be “adequate” for the purposes of public review regarding its scope and content. The regulations now state that a DEIS is adequate where it meets the requirements of the final written scope (under the revised §§ 617.8(g) and 617.9(b)) and provides the public and involved agencies with the necessary information to evaluate project impacts, alternatives, and mitigation measures.⁷⁹ The amendments also limited the lead agency’s determination of adequacy of a resubmitted DEIS to be based solely on the written list of deficiencies provided by that agency following the previous review.⁸⁰

In its final revision to 6 N.Y.C.R.R. § 617.9, DEC also added climate change and its associated impacts to the list of issues that “should” be addressed in an EIS, where such issues are “applicable and significant.”⁸¹

Council on Environmental Quality (CEQ), which require that agencies “make diligent efforts to involve the public in preparing and implementing their NEPA procedures[,]” but do not require public meetings or hearings unless there may be substantial environmental controversy concerning the environmental effects of the proposed action, a substantial interest in holding the meeting, or a request for a meeting by another agency with jurisdiction over the action. 40 C.F.R. § 1506.6(a)–(c) (2018).

78. 6 N.Y.C.R.R. § 617.12 (2018).

79. *Id.* § 617.9(a)(2).

80. *Id.* § 617.9(a)(2)(ii). The underlying intent behind the revision is to prevent the lead agency from endlessly reviewing the DEIS and requiring the applicant to add more information to never-ending lists of new deficiencies. *See, e.g.,* Gordon v. Planning Bd. of Town of Bedford, No. 15566/90 (Sup. Ct. Westchester Cty. 1991).

81. 6 N.Y.C.R.R. § 617.9(b)(5)(iii).

The FGEIS explained that a project may result in added greenhouse gas emissions, which would contribute to climate change and associated impacts, but that climate change could also exacerbate other environmental hazards, creating greater risk for both the subject project and on the local environment and communities.⁸² The FGEIS noted that there is an important distinction between the two categories of climate change “mitigation” under SEQRA:

(1) mitigation of greenhouse gas emissions, including measures to reduce greenhouse gas emissions that result from a project, since such emissions contribute to climate change; and (2) mitigation of climate change vulnerabilities, which include vulnerabilities of a project that may be caused or exacerbated by climate change. SEQRA encompasses both types of mitigation, as well as consideration of both types of related impacts of climate change. That is, SEQRA mandates consideration of greenhouse gas emissions that contribute to climate change (category 1 above), as well as consideration of how climate change may alter a project’s environmental impacts during the lifetime of that project (category 2).⁸³

Where climate change and its effects are considered relevant and significant impacts, the environmental review must then consider “measures to avoid or reduce both an action’s impacts on climate change and associated impacts due to the effects of climate change such as sea level rise and flooding.”⁸⁴

F. Clarification of SEQRA Fee Assessments (6 N.Y.C.R.R. § 617.13)

Finally, the amendments clarified the fee assessment authority contained in SEQRA by specifying that project sponsors can request

82. See FGEIS, *supra* note 52, at 149–50. The environmental impacts that stem from a project’s vulnerability to climate change should be “evaluated on a project-by-project” basis to determine whether such impacts are “substantive or proportional.” *Id.* at 149. DEC submits that it is less costly to perform an evaluation whether climate change or its effects are a potentially significant impact where the existing environmental context warrants it—such as if the proposed action is located within a delineated floodplain—than the consequences would be should the project sponsor choose to ignore the realities of recent climate events such as flooding. See *id.* In addressing comments on the DGEIS, DEC expressly declined to mandate the use of a standardized procedure for reviewing climate change impacts, such as such methods in its 2009 Policy for Assessing Energy Use and Greenhouse Gas Emissions in Environmental Review. *Id.* at 150. DEC noted that lead agencies may, and often do, use DEC policies without being required to do so, and that DEC policies are internal guidance that do not alter existing statutory authority or regulatory requirements. *Id.* This leaves an open question as to how lead agencies will implement the new requirement to review climate change and its effects (where substantial and relevant), including, for example, determining the significance of increases of GHGs due to a proposed action. FGEIS, *supra* note 52, at 150.

83. *Id.* at 148.

84. *Id.* at 150 (adding such requirement where relevant and significant).

invoices for statements for the work performed when the lead agency has hired a contractor, for which payment is charged back to the sponsor.⁸⁵ This addition to the regulations assures that the project sponsor will fairly receive full disclosure regarding the actual costs of review by the lead agency (and its consultants).⁸⁶

III. CASE LAW DEVELOPMENTS

A. Thresholds and Procedural Requirements in SEQRA Litigation

SEQRA litigation invariably is a special proceeding under Article 78 of Civil Practice Law and Rules (CPLR).⁸⁷ Article 78 imposes upon petitioners in such proceedings certain threshold and procedural requirements, separate and distinct from the requirements SEQRA imposes.⁸⁸ A number of decisions during the *Survey* period addressed questions arising from these threshold and procedural requirements, as well as obligations arising solely from SEQRA.

1. Standing

Standing is one of the more frequently litigated issues in SEQRA case law.⁸⁹ To establish standing, a SEQRA petitioner must demonstrate that the challenged action causes injury that is: (1) within the “zone of interests” sought to be protected by the statute; and (2) different from any generalized harm caused by the action to the public at large.⁹⁰ To fall within SEQRA’s “zone of interests,” the alleged injury must be “environmental and not solely economic in nature.”⁹¹ The harm must be “different in kind or degree from the public at large,” but it need not be unique.⁹² An organization has standing to sue when “one or more of its

85. 6 N.Y.C.R.R. § 617.13 (2018).

86. See FGEIS, *supra* note 52, at 156–57.

87. See N.Y. C.P.L.R. 7803 (McKinney 2008).

88. N.Y. C.P.L.R. 7801(1) (McKinney 2008).

89. See Charlotte A. Biblow, *Courts Tackle Standing and SEQRA Review*, N.Y.L.J., May 22, 2014, at 1.

90. *Save the Pine Bush, Inc. v. Common Council*, 13 N.Y.3d 297, 308–09, 918 N.E.2d 917, 924, 890 N.Y.S.2d 405, 412 (2009) (Pigott, J., concurring) (quoting *Soc’y of Plastics Indus., Inc. v. City of Suffolk*, 77 N.Y.2d 761, 773–74, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)).

91. *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990) (first citing *Niagara Recycling, Inc. v. Town Bd.*, 83 A.D.2d 335, 341, 443 N.Y.S.2d 951, 955 (4th Dep’t 1981); and then citing *Webster Assocs. v. Webster*, 112 Misc. 2d 396, 402, 447 N.Y.S.2d 401, 405 (Sup. Ct. Monroe Cty. 1981)).

92. *Sierra Club v. Village of Painted Post*, 26 N.Y.3d 301, 311, 43 N.E.3d 745, 749, 22 N.Y.S.3d 388, 392 (2015) (quoting *Soc’y of Plastics*, 77 N.Y.2d at 778, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788).

members would have standing to sue,” the interests asserted by the organization “are germane to its purposes,” and “neither the asserted claim nor the appropriate relief requires the participation of the [organization’s] individual members.”⁹³

Several SEQRA decisions addressed standing during this *Survey* period. A number of the standing decisions in this *Survey* period involved the presumption that standing arises based on a party’s proximity to the proposal at issue. In challenges to rezoning decisions, there is a well-established presumption that both “injury” (or “aggrievement”) and “an interest different from other members of the community” may be inferred or presumed if the petitioner resides in or owns property subject to the rezoning.⁹⁴ This principle was reaffirmed in *Plattsburgh Boat Basin, Inc. v. City of Plattsburgh*, in which the court held that the owner of a property subject to a zoning change need not plead specific environmental harm to establish standing to challenge the sufficiency of an agency’s efforts to comply with SEQRA.⁹⁵ This presumption, which developed in the context of zoning changes has been applied outside of the rezoning context in certain cases where proximity to a particular action has been sufficient to establish standing.⁹⁶ Indeed, multiple courts have held that “[i]njury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury.”⁹⁷ However, the presumption has not been consistently applied.⁹⁸

In *Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Board*, the petitioners, most of whom were nearby property

93. *Soc’y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786; see *Save the Pine Bush*, 13 N.Y.3d at 304, 918 N.E.2d at 921, 890 N.Y.S.2d at 409 (citing *Soc’y of Plastics*, 77 N.Y.2d at 775, 573 N.E.2d at 1042, 570 N.Y.S.2d at 786).

94. See *Gernatt Asphalt Prods., Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 687, 664 N.E.2d 1226, 1238, 642 N.Y.S.2d 164, 176 (1996) (citing *Mobil Oil Corp.*, 76 N.Y.2d at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 950).

95. 50 Misc. 3d 271, 274, 21 N.Y.S.3d 529, 531 (Sup. Ct. Clinton Cty. 2015).

96. *Id.* at 273, 21 N.Y.S.3d at 531.

97. *Radow v. Bd. of Appeals of Town of Hempstead*, 120 A.D.3d 502, 503, 989 N.Y.S.2d 914, 915 (2d Dep’t 2014) (quoting *Powers v. De Groodt*, 43 A.D.3d 509, 513, 841 N.Y.S.2d 163, 167 (3d Dep’t 2007)) (citing *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 414, 508 N.E.2d 130, 134, 515 N.Y.S.2d 418, 422 (1987)).

98. See Mark A. Chertok et al., *2013–14 Survey of New York Law: Environmental Law: Developments in the Law of SEQRA*, 65 SYRACUSE L. REV. 749, 761–62 (2015). For a discussion of various applications, see, e.g., *O’Brien v. N.Y. State Comm’n of Educ.*, 112 A.D.3d 188, 193–94, 975 N.Y.S.2d 205, 209 (3d Dep’t 2013) (declaring that “under our decisional law a distance of over 1,000 feet ‘is not close enough to give rise to the presumption that the neighbor is or will be adversely affected by the proposed project.’”).

owners, had alleged that the Planning Board of the Town of Haverstraw had failed to comply with SEQRA by not requiring a second supplemental EIS (SEIS) after a project was changed to include a large convenience store and sixteen gas pumps.⁹⁹ In its decision, the Second Department upheld the Supreme Court's decision that the petitioners had standing, with the exception of petitioner John McDowell, who lived over 2,000 feet from the proposed development and did "not live close enough to the site to be afforded a presumption of injury-in-fact based on proximity alone."¹⁰⁰ Further, the court found that McDowell lacked standing because the petitioners had not sufficiently demonstrated he would "suffer an environmental injury different from that of members of the public at large."¹⁰¹ The remaining petitioners were found to have standing, as the lower court properly inferred injury in fact based on proximity because they all owned or leased properties across the street from and within 500 feet of the proposed development, and they had alleged environmental harm within the zone of interests protected by SEQRA.¹⁰²

In *Chenango Valley Central School District v. Town of Fenton Planning Board*,¹⁰³ the petitioners challenged the Planning Board's environmental review related to a proposed construction of a natural gas compressor facility that would extract natural gas from a pipeline and fill specialized trucks with compressed gas for transportation to customers.¹⁰⁴ The court found standing for petitioner St. Francis of Assisi Parish by way of proximity; for petitioner Maureen Singer by way of proximity to the proposed development and frequent use and enjoyment of a park that was immediately south of the project; for petitioner Linda Baker by way of residence on a cul-de-sac with one roadway access point which would be impacted by increased truck traffic, as well as alleged use of the park;

99. 153 A.D.3d 825, 60 N.Y.S.3d 381 (2d Dep't 2017).

100. *Id.* at 826, 60 N.Y.S.3d at 385 (quoting *Riverhead Neighborhood Preserv. Coalition, Inc. v. Town of Riverhead Town Bd.*, 112 A.D.3d 944, 945, 977 N.Y.S.2d 382 (2d Dep't 2013)).

101. *Id.* at 827, 60 N.Y.S. at 386 (first citing *Riverhead Neighborhood Preserv. Coalition*, 112 A.D.3d at 945, 977 N.Y.S.2d at 384; and then citing *Barrett v. Dutchess Cty. Legislature*, 38 A.D.3d 654, 654, 831 N.Y.S.2d 540, 544 (2d Dep't 2007)).

102. *Id.* at 826, 60 N.Y.S. at 385 (first citing *Sun-Brite Car Wash*, 69 N.Y.2d at 414, 508 N.E.2d at 134, 515 N.Y.S.2d at 422 (1987); then citing *Citizens for St. Patrick's v. City of Watervliet City Council*, 126 A.D.3d 1159, 1160, 5 N.Y.S.3d 582, 584 (3d Dep't 2015); then citing *Vill. of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 90, N.Y.S.2d 321, 335 (2d Dep't 2007); and then citing *McGrath v. Town Bd. Of Town of N. Greenbush*, 254 A.D.2d 614, 616, 678 N.Y.S.2d 834, 836 (3d Dep't 1998)).

103. No. CA2017001388, 2017 N.Y. Slip Op. 31820(U) (Sup. Ct. Broome Cty, Aug. 28, 2017).

104. *Id.* at 3.

and petitioner school district whose “heightened duty to its students combined with the specific identifiable traffic safety concern satisfie[d] the requirement that the injury [was] in some way different from that of the public at large.”¹⁰⁵ The court found that other petitioners had no standing where they lived 1,100 feet and 5,000 feet from the proposed development and made no other particularized claims.¹⁰⁶ In so finding, the court explained that “[s]tanding should be liberally constructed so that land use disputes are settled on their own merits rather than by preclusive, restrictive standing rules.”¹⁰⁷

Courts have acknowledged the challenges of establishing standing and emphasized that “[p]laintiffs must not only allege, but if the issue is disputed must prove, that their injury is real and different from the injury most members of the public face.”¹⁰⁸ For example, in *Shapiro v. Torres*, the Second Department explained that standing cannot be conferred when alleged environmentally-related injuries are “too speculative and conjectural to demonstrate an actual and specific injury-in-fact.”¹⁰⁹ There, standing under SEQRA was not supported by general environmental claims and mere proximity without any zoning issues alleged.¹¹⁰ In *Committee for a Sustainable Waterfront v. Planning Board of the City of Glen Cove*, the petitioners-plaintiffs sought to annul a resolution regarding a large scale waterfront construction project based on the argument, inter alia, that an SEIS was required after changes were made to the proposed project’s stormwater management system.¹¹¹ The petitioners-plaintiffs described themselves as “persons who ‘enjoy[] and utilize[] the public areas and amenities, including the Boardwalk, pavilion, waterways, and attend various events and concerts at the beach

105. *Id.* at 13–14 (first citing *Save the Pine Bush, Inc. v. Common Council*, 13 N.Y.3d 297, 301, 918 N.E.2d 917, 918, 890 N.Y.S.2d 405, 406 (2009); and then citing *Soc’y of Plastics Indus., Inc. v. City of Suffolk*, 77 N.Y.2d 761, 774, 573 N.E.2d 1034, 1041, 570 N.Y.S.2d 778, 785 (1991)).

106. *Id.* at 15.

107. *Id.* at 11 (quoting *Parisella v. Town of Fishkill*, 209 A.D.2d 850, 851, 619 N.Y.S.2d 169, 170 (3d Dep’t 1994)).

108. *Save the Pine Bush*, 13 N.Y.3d at 306, 918 N.E.2d at 922, 890 N.Y.S.2d at 410.

109. 153 A.D.3d 835, 836, 60 N.Y.S.3d 366, 358 (2d Dep’t 2017) (quoting *Kindred v. Monroe County*, 119 A.D.3d 1347, 1348, 989 N.Y.S.2d 732, 733 (4th Dep’t 2014)).

110. *Id.* (first citing *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 410, 508 N.E.2d 130, 13, 515 N.Y.S.2d 418, 419 (1987); then citing *Kindred*, 119 A.D.3d at 1348, 989 N.Y.S.2d at 733; then citing *Save our Main St. Buildings v. Greene County Legislature*, 293 A.D.2d 907, 908, 740 N.Y.S.2d 715, 717 (3d Dep’t 2002); and then citing *Oates v. Village of Watkins Glen*, 290 A.D.2d 758, 761, 736 N.Y.S.2d 478, 481 (3d Dep’t 2002)).

111. *Comm’n for a Sustainable Waterfront v. Planning Bd. of Glen Cove*, No. 1948/17, N.Y.L.J. LEXIS 3031, at *1 (Sup. Ct. Nassau Cty. Oct. 16, 2017).

within five hundred (500) feet of the Site, within one thousand (1000) feet of the Site, within view of the Site and/or within audible distance of the site.”¹¹² The court relied on *Tuxedo Land Trust, Inc. v. Town of Tuxedo* in denying standing where the petitioners-plaintiffs did not indicate that any subject individual used the waterfront “more frequently or with any greater enthusiasm, inquisitiveness or concern than any other person with physical access to the same resources.”¹¹³

Meanwhile, in *Village of Woodbury v. Seggos*, the Third Department addressed standing in connection with a backup water supply source for the Village of Kiryas Joel.¹¹⁴ Kiryas Joel had applied for a permit from DEC to develop a well field at a site, prompting multiple lower court actions from nearby residents and municipalities.¹¹⁵ The Third Department affirmed the lower court’s rejection of standing for organizations alleging harm based on the depletion of water-dependent natural resources as a result of additional water withdrawals, as the court viewed this harm as no different from that of the general public.¹¹⁶ However, the Third Department found standing for those individuals and municipalities alleging harm based on impact to a nearby owner’s water supply.¹¹⁷ “Inasmuch as these allegations show ‘how [the municipalities]’ personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large, and [how they] will suffer an injury that is environmental and not solely economic in nature,’ they also have standing.”¹¹⁸

In *Brooklyn Heights Association, Inc. v. N.Y.S. Urban Development Corp.*, the Brooklyn Heights Association (BHA) challenged the authorization of a private commercial real estate development at Pier 6 of

112. *Id.* at *3.

113. *Id.* at *3–4, *8 (internal quotations omitted) (quoting *Tuxedo, Land Tr. v. Town Bd. of Town of Tuxedo*, No. 13675/10, 2012 N.Y. Slip Op. 50377(U), at 8 (N.Y. Sup. Orange Cty. Mar. 5, 2012)).

114. 154 A.D.3d 1256, 1256, 65 N.Y.S.3d 76, 79 (3d Dep’t 2017).

115. *Id.* at 1257, 65 N.Y.S.3d at 80.

116. *Id.* at 1258–59, 65 N.Y.S.3d at 81 (citing *N.Y. Ass’n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211, 810 N.E.2d 405, 407, 778 N.Y.S.2d 123, 125 (2004)).

117. *Id.* at 1259, 65 N.Y.S.3d at 81–82 (first citing *N.Y. ENVTL. CONSERV. LAW § 15-503 (2)(c), (f)* (McKinney 2006 & Supp. 2019); then citing *Humane Soc’y. of U.S. v. Empire State Dev. Corp.*, 53 A.D.3d 1013, 1017, 863 N.Y.S.2d 107, 111 (3d Dep’t 2008); and then citing *Many v. Vill. of Sharon Springs Bd. of Trustees*, 218 A.D.2d 845, 845–46, 629 N.Y.S.2d 868, 870 (3d Dep’t 1995)).

118. *Id.* at 1259, 65 N.Y.S.3d at 82 (first citing *Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1541, 945 N.Y.S.2d 434, 437–38 (3d Dep’t 2012) (internal quotation marks and citations omitted); and then citing *Vill. of Canajoharie v. Planning Bd. of Town of Fla.*, 63 A.D.3d 1498, 1501, 882 N.Y.S.2d 526, 529 (3d Dep’t 2009)).

Brooklyn Bridge Park.¹¹⁹ The subject of the litigation was Brooklyn Bridge Park, which was originally built on abandoned, deteriorated docklands belonging to the Port Authority of New York City.¹²⁰ A memorandum of understanding between New York State and the City created the Brooklyn Bridge Park Development Corporation (BBPDC) as a subsidiary of the New York State Urban Development Corporation (d/b/a Empire State Development, or ESD) to develop a general project plan for the Park, and charged ESD as the lead agency to preside over an environmental review under SEQRA.¹²¹ Subsequently, and after ESD had adopted the FEIS, Brooklyn Bridge Park Corporation (BBPC) was created and given broad-based governance power for the Park in 2010, though a subsequent 2016 letter to BBPC's president acknowledged the transfer of lead agency status to BBPC from ESD and BBPDC.¹²² At issue, in part, was a technical memorandum prepared by the respondents' consultant in 2014 to determine whether an SEIS was needed, and which concluded that one was not warranted.¹²³ An update to the technical memorandum in 2015 reached the same conclusion.¹²⁴

The petitioner, among other claims, alleged that ESD, and not BBPC, should have supervised the technical memorandum, arguing that BBPC had not been properly designated as the lead agency, that the final technical memorandum update was defective for failure to identify the agency that conducted the review, and that the lead agency, even if it were BBPC, had improperly delegated its nondelegable duty to make its SEIS determination to "whoever prepared the technical memorandum update."¹²⁵ The court determined that BHA lacked standing to challenge the lead agency change, relying on Second Department and Third Department case law holding that "a challenge [to the selection of a lead agency] may only be commenced by another 'involved agency.'"¹²⁶

Finally, in *Board of Fire Commissioner of the Fairview Fire District v. Town of Poughkeepsie Planning Board*, the Second Department held, consistent with prior decisional law, that economic injury is not within

119. No. 155641/2016, 2018 N.Y. Slip Op. 50211(U), at 1 (Sup. Ct. N.Y. Cty. Feb. 15, 2018).

120. *Id.* at 2.

121. *Id.* at 1–2.

122. *Id.* at 3, 6, 18.

123. *Id.* at 1, 6.

124. *Brooklyn Heights Ass'n*, 2018 N.Y. Slip Op. 50211(U), at 5–6.

125. *Id.* at 18.

126. *Id.* at 21 (first citing *King v. Cty. of Saratoga Indus. Dev. Agency*, 208 A.D.2d 194, 201, 622 N.Y.S.2d 339, 344 (3d Dep't 1995); and then citing *Inc. Vill. of Poquott v. Cahill*, 11 A.D.3d 536, 539, 782 N.Y.S.2d 823, 827 (2d Dep't 2004)).

the purview of SEQRA.¹²⁷ In *Fairview*, the court affirmed a lower court's determination that a fire protection district did not have standing under SEQRA to contest a proposed housing project.¹²⁸ The court rejected the petitioner's standing arguments that relied on the financial burden placed on the fire district as a result of an increase in residents and service calls, as "[t]o qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature. . . . [E]conomic injury is not by itself within the zone of interests which SEQRA seeks to protect."¹²⁹

The court further rejected arguments based on traffic impacts as no different from any environmental injury suffered by the public at large.¹³⁰ Further, municipal agencies are unable to assert the "collective individual rights of its residents," and the petitioner failed to allege that it was acting in a representative capacity for its citizens.¹³¹ Rather, "[i]n order to establish standing to challenge a SEQRA determination, a municipality must demonstrate how its personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large."¹³²

2. Ripeness, Statute of Limitations, and Administrative Exhaustion

In addition to standing, a SEQRA petitioner also must satisfy several threshold requirements, including that the claim be ripe, that administrative remedies be exhausted,¹³³ and that the claim be timely

127. 156 A.D.3d 621, 623, 67 N.Y.S.3d 30, 33 (2d Dep't 2017) (first citing *Soc'y of Plastics Indus., Inc. v. City of Suffolk*, 77 N.Y.2d 761, 777, 573 N.E.2d 1034, 1045, 570 N.Y.S.2d 778, 788 (1991); then citing *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433, 559 N.E.2d 641, 644, 559 N.Y.S.2d 947, 950 (1990); and then citing *Valhalla Union Free Sch. Dist. v. Bd. of Legislators of Cty. of Westchester*, 583 N.Y.S.2d 503, 505, 183 A.D.2d 771 (2d Dep't 1992)).

128. *Id.*

129. *Id.* at 622–23, 67 N.Y.S.3d at 32 (first citing *Cty. Oil Co., Inc. v. N.Y.C. Dep't of Env'tl. Prot.*, 111 A.D.3d 718, 719, 975 N.Y.S.2d 114, 116 (2d Dep't 2013); then citing *Valhalla Union Free Sch. Dist.*, 183 A.D.2d at 772, 583 N.Y.S.2d at 504; then citing *Soc'y of Plastics Indus.*, 77 N.Y.2d at 777, 573 N.E.2d at 1044, 570 N.Y.S.2d at 788; and then citing *Mobil Oil Corp.*, 76 NY2d at 433, 559 N.E.2d at 644, 559 N.Y.S.2d at 950).

130. *Id.* at 623, 67 N.Y.S.3d at 32 (first citing *Shelter Island Ass'n v. Zoning Bd. of Appeals of Town of Shelter Island*, 57 A.D.3d 907, 909, 869 N.Y.S.2d 615, 617 (2d Dep't 2008); and then citing *Long Island Pine Barrens Soc'y v. Planning Bd.*, 213 A.D.2d 484, 485, 623 N.Y.S.2d 613, 615 (2d Dep't 1995)).

131. *Id.* at 623, 67 N.Y.S.3d at 33 (citing *Village of Chestnut Ridge v. Town of Ramapo*, 45 A.D.3d 74, 91, 841 N.Y.S.2d 321, 337 (2d Dep't 2007)).

132. *Fairview Fire Dist.*, 156 A.D.3d at 623–24, 67 N.Y.S.3d at 33 (citing *Town of Amsterdam v. Amsterdam Indus. Dev. Agency*, 95 A.D.3d 1539, 1541, 945 N.Y.S.2d 434, 438 (3d Dep't 2012)).

133. Under the doctrine of administrative exhaustion, "courts generally refuse to review a

brought within the statute of limitations period.¹³⁴

B. Ripeness

With respect to ripeness, only final agency actions are subject to challenge in a SEQRA (or any other Article 78) challenge.¹³⁵ An agency action is “final” where it “impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process.”¹³⁶

During this *Survey* period, the Third Department addressed ripeness in *Global Cos. LLC v. New York Department of Environmental Conservation*.¹³⁷ The petitioner had submitted to DEC an application to modify its clean air permit in order to expand its crude oil storage capabilities.¹³⁸ DEC issued a notice of complete application (NOCA)

determination on environmental or zoning matters based on evidence or arguments that were not presented during the proceedings before the lead agency.” *Miller v. Kozakiewicz*, 300 A.D.2d 399, 400, 751 N.Y.S.2d 524, 526–27 (2d Dep’t 2002) (first citing *Long Island Pine Barrens Soc’y*, 204 A.D.2d at 550, 611 N.Y.S.2d at 918–19; then citing *Harriman v. Town Bd.*, 153 A.D.2d 633, 635, 544 N.Y.S.2d 860, 862 (2d Dep’t 1989); and then citing *Aldrich v. Pattison*, 107 A.D.2d 258, 267–69, 486 N.Y.S.2d 23, 30–31 (2d Dep’t 1985)). *But see Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 427, 494 N.E.2d 429, 442, 503 N.Y.S.2d 298, 311 (1986). The court noted that

[n]o one raised the issue [of impairment of archaeological resources] during the lengthy hearing and comment periods before the FEIS was issued. Petitioners themselves participated actively in the administrative process, submitting several oral and written statements on the DEIS, yet failed to mention any impact on archaeology. While the affirmative obligation of the agency to consider environmental effects, coupled with the public interest, lead us to conclude that such issues cannot be foreclosed from judicial review, petitioners’ silence cannot be overlooked in determining whether the agency’s failure to discuss an issue in the FEIS was reasonable. The EIS process is designed as a cooperative venture, the intent being that an agency have the benefit of public comment before issuing a FEIS and approving a project; permitting a party to raise a new issue after issuance of the FEIS or approval of the action has the potential for turning cooperation into ambush.

Id. (first citing *Vt. Yankee Nuclear Power Corp. v. Natural Def. Council*, 435 U.S. 519, 553–54 (1978); and then citing *Aldrich*, 107 A.D.2d at 268–69, 486 N.Y.S.2d at 31).

134. *See* N.Y. C.P.L.R. 7801(1) (McKinney 2008).

135. *Id.*

136. *Essex Cty. v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998) (citing *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112–13 (1948)).

137. 155 A.D.3d 93, 101, 64 N.Y.S.3d 133, 139 (3d Dep’t 2017) (citing *Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Comm’n*, 71 A.D.3d 679, 681, 896 N.Y.S.2d 382, 384 (2d Dep’t 2010); and then citing *Demers v. N.Y. State Dep’t of Env’tl. Conservation*, 3 A.D.3d 744, 746, 770 N.Y.S.2d 807, 808 (3d Dep’t 2004)).

138. *Id.* at 95, 64 N.Y.S.3d at 135 (first citing 42 U.S.C. § 7661 (2018); and then citing N.Y. ENVTL. CONSERV. LAW § 19-0311 (McKinney 2006)).

under its permitting regulations, designated itself as lead agency, and issued a negative declaration under SEQRA.¹³⁹ The public comment period resulted in 19,000 public comments, including a letter from the U.S. Environmental Protection Agency questioning the petitioner's emissions calculations.¹⁴⁰ A number of individuals and organizations filed an Article 78 proceeding and declaratory judgment action seeking annulment of the negative declaration, and DEC later notified the petitioner that it intended to rescind the NOCA and negative declaration.¹⁴¹ The petitioner had argued that the rescission of the NOCA and intent to rescind the negative declaration were untimely.¹⁴² However, not only did the NOCA rescission occur prior to the expiration of the eighteen month review period, the notice of intent to rescind the negative declaration was timely because DEC had not made a final decision on the modification.¹⁴³ The petitioner had also maintained that DEC's notice to rescind the negative declaration was arbitrary and capricious, which the court found was not ripe for judicial review because "DEC has not rendered a definitive decision in this respect and, accordingly, petitioner has not suffered a concrete injury."¹⁴⁴

C. Statute of Limitations

Pursuant to the statute of limitations for Article 78 proceedings, a SEQRA challenge must be made "within four months after the determination to be reviewed becomes final and binding upon the petitioner,"¹⁴⁵ and that period begins to run when the agency has taken a "definitive position on the issue that inflicts an actual, concrete injury."¹⁴⁶ As a practical matter, it can be difficult to identify that point in time when

139. *Id.*; 6 N.Y.C.R.R. § 621.6(g) (2018) ("If an application is determined to be complete, a notice of complete application must be prepared.").

140. *Global Cos. LLC*, 155 A.D.3d at 96, 64 N.Y.S.3d at 135.

141. *Id.* at 96, 64 N.Y.S.3d at 135–36.

142. *Id.* at 101, 64 N.Y.S.3d at 139.

143. *Id.*; see 6 N.Y.C.R.R. § 617.7 (2018).

144. *Global Cos. LLC*, 155 A.D.3d at 101, 64 N.Y.S.3d at 139 (first citing *Town of Riverhead v. Central Pine Barrens Joint Planning & Policy Comm'n*, 71 A.D.3d 679, 681, 896 N.Y.S.2d 382, 384 (2d Dep't 2010); and then citing *Demers v. N.Y. State Dep't of Envtl. Conservation*, 3 A.D.3d 744, 746, 770 N.Y.S.2d 807, 808 (3d Dep't 2004)).

145. N.Y. C.P.L.R. 217(1) (McKinney 2003).

146. *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218, 223, 803 N.E.2d 361, 363, 771 N.Y.S.2d 40, 42 (2003) (quoting *Essex Cty. v. Zagata*, 91 N.Y.2d 447, 453, 695 N.E.2d 232, 235, 672 N.Y.S.2d 281, 284 (1998)); see *Young v. Bd. of Trs.*, 89 N.Y.2d 846, 848–49, 675 N.E.2d 464, 466, 652 N.Y.S.2d 729, 731 (1996) (quoting 6 N.Y.C.R.R. § 617.2(b)(2)–(3) (2018)) (citing *Save the Pine Bush, Inc. v. Common Council*, 70 N.Y.2d at 203, 512 N.E.2d at 529, 518 N.Y.S.2d at 946 (1987)) ("[T]he Statute of Limitations was triggered when the Board committed itself to 'a definite course of future decisions.'").

the statute of limitations begins to accrue, and the trigger point has become an area of some confusion.¹⁴⁷

During this *Survey* period, the court addressed the running of the statute of limitations in *Forst v. Long Island Power Authority (LIPA)*.¹⁴⁸ In *Forst*, the plaintiff-petitioner residents sought to remove recently installed utility poles near their homes, and brought an Article 78 action to challenge the Long Island Power Authority's SEQRA compliance in issuing a negative declaration.¹⁴⁹ LIPA argued that, because this project was an unlisted action for which publication of the negative declaration was not required in the Environmental Notice Bulletin pursuant to 6 N.Y.C.R.R. § 617.12(c)(1), the four-month statute of limitations period began to accrue from the date that the negative declaration was brought to LIPA's file room in October 2013 for filing in compliance with the SEQRA Handbook.¹⁵⁰ The court acknowledged, however, that the residents "suffered a concrete injury not amenable to further administrative review and corrective action" with the placement of the utility poles, for which work commenced on January 1, 2014, and for which residents were first notified by LIPA of the project's approval during the first week of January 2014.¹⁵¹ As a result, the court determined that the plaintiffs-petitioners had until May 1, 2014 to file its claim under Article 78.¹⁵²

D. Procedural Requirements Imposed by SEQRA on State Agencies

As explained in Part I, much of SEQRA's mandate is procedural; lead agencies must comply with SEQRA's requirements to identify the type of action at issue, complete a scoping process, issue a determination of significance, and, if the determination is positive, require preparation of an EIS. Several cases during the *Survey* period concerned lead agencies' alleged failures to comply with one or more of these procedural mandates.

147. See *Stop-The-Barge*, 1 N.Y.3d at 221–23, 803 N.E.2d at 362–63, 771 N.Y.S.2d at 41–42; *Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 317, 854 N.E.2d 464, 469, 821 N.Y.S.2d 142, 147 (2006). See Chertok et al., *supra* note 24, at 921–22, for a discussion of these cases. The confusion stems from these two Court of Appeals decisions.

148. No. 10675/2014, 2017 N.Y. Slip Op. 32471(U), at 3 (Sup. Ct. Suffolk Cty. Oct. 5, 2017).

149. *Id.* at 2.

150. *Id.* at 3.

151. *Id.* at 4 (citing *Eadie*, 7 N.Y.3d at 316, 854 N.E.2d at 468–69, 821 N.Y.S.2d at 146–47 (2006)) (quoting *In re City of New York*, 6 N.Y.3d 540, 548, 814 N.Y.S.2d 592, 597, 847 N.E.2d 1166, 1170 (2006)).

152. *Id.* at 6.

*I. Classification of the Action**A. Ministerial Versus Discretionary Actions*

Only “actions” as defined pursuant to 6 N.Y.C.R.R. § 617.2(b) are subject to SEQRA.¹⁵³ Actions not involving a discretionary agency “approval” of some nature¹⁵⁴ are considered ministerial in nature and are not subject to SEQRA.¹⁵⁵ During this *Survey* period, the Second Department, in *Sierra Club v. Martens*, clarified that DEC’s initial approval of a water withdrawal permit for a thermoelectric generating station operating in Long Island City, Queens, pursuant to the New York State Water Resources Protection Act (“WRPA”),¹⁵⁶ was an agency “action” subject to SEQRA.¹⁵⁷ DEC had argued that issuance of the permit was a ministerial action because it had no discretion but to issue initial permits for the amount of the water withdrawals for users that were in operation and properly reported their withdrawals to the agency, and the Supreme Court upheld its determination.¹⁵⁸ However, the Second Department reversed and held that DEC’s issuance of an “initial permit” for making water withdrawals pursuant to Environmental Conservation Law § 15-1501(9) was *not* a ministerial act excluded from the definition of “action” under SEQRA.¹⁵⁹ The Second Department noted that under the WRPA, DEC may grant, deny, or approve a permit with conditions,

153. 6 N.Y.C.R.R. § 617.2(b) (2018).

Actions include: (1) projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that: (i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies; (2) agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions; (3) adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment; and (4) any combinations of the above.

Id.

154. *See id.* § 617.2(e).

155. *See id.* § 617.5(a), (c)(19); *see also* SEQR HANDBOOK, *supra* note 13, at 13.

156. *See* N.Y. ENVTL. CONSERV. LAW § 15-1501(9) (McKinney 2018) (requiring an initial permit to be granted for water withdrawal); *see also* HUDSON RIVER WATER ALLIANCE, REGULATING WATER WITHDRAWALS IN N.Y.: THE WATER RESOURCES PROTECTION ACT 1–2 (2015), <http://hudsonvalleyregionalcouncil.org/wp-content/uploads/2015/11/Regulating-Water-Withdrawal-in-NY-s.pdf> (explaining that the WRPA is codified in Title 15).

157. 158 A.D.3d 169, 170–74, 68 N.Y.S.3d 84, 86–89 (2d Dep’t 2018); *see* ENVTL. CONSERV. § 15-1501.

158. *Sierra Club*, 158 A.D.3d at 173–74, 68 N.Y.S.3d at 89.

159. *Id.* at 177–78, 68 N.Y.S.3d at 92; *see* N.Y. ENVTL. CONSERV. LAW § 8-0105 (McKinney 2017).

and the statutory factors DEC must consider in permit issuance “do not lend themselves to mechanical application[,]” but rather involve the judgment and discretion of DEC in ascertaining whether certain conditions apply in each operator’s unique circumstances.¹⁶⁰ While the WRPA is mandatory with respect to the maximum volume of water an operator is authorized to withdraw, the statute clearly authorizes DEC to act in a discretionary manner with respect to the imposition of conditions; thus, DEC must comply with SEQRA in its issuance of initial permits under the WRPA.

In contrast, during this *Survey* period, the Supreme Court of Suffolk County held that DEC’s issuance of a Wildlife Rehabilitation License was a ministerial action not subject to SEQRA review.¹⁶¹ In contrast to the issuance of a WRPA permit above, the agency’s discretion as whether to issue a Wildlife Rehabilitation License was highly restricted by a specific set of qualifications a wildlife rehabilitator must possess. Thus, the court held that where DEC must follow “a discrete set of criteria which have no relationship to the environmental concerns raised in an EIS,” the issuance of the license was not an “action” under SEQRA.¹⁶²

B. Classifying a Discretionary Action as Type I, Type II, or Unlisted

“As previously described, an initial stage of SEQRA review is the agency’s classification of a proposed action as a Type I, Type II, or Unlisted action.”¹⁶³ Most challenges on this subject involve the classification itself, particularly when the action is classified as a Type II action, ending the SEQRA process.

In *Town of Pittsford v. Power Authority of the State of New York*, respondent Canal Corporation classified the removal of vegetation from the Erie Canal as a Type II action, with which DEC had agreed.¹⁶⁴ However, the record demonstrated that the acreage to be cleared far exceeded the ten-acre limit on physical alterations set forth in 6

160. *Sierra Club*, 158 A.D.3d at 177, 68 N.Y.S.3d at 91 (quoting N.Y. ENVTL. CONSERV. LAW § 15-1503 (McKinney 2006 & Supp. 2019)) (first citing N.Y. Civil Liberties Union v. State, 4 N.Y.3d 175, 184, 824 N.E.2d 947, 953, 791 N.Y.S.2d 507, 513 (2005); then citing *Tango v. Tulevech*, 61 N.Y.2d 34, 41, 459 N.E.2d 182, 186, 471 N.Y.S.2d 73, 77 (1983); and then citing *Tartar v. State*, 68 N.Y.2d 511, 518–19, 503 N.E.2d 84, 87, 510 N.Y.S.2d 528, 531 (1986)).

161. *Evelyn Alexander Wildlife Rescue Ctr. Inc. v. N.Y. State Dep’t of Envtl. Conservation*, No. 4818/2016, 2017 N.Y. Slip Op. 51423(U), at 3–5 (Sup. Ct. Suffolk Cty. 2017) (citing N.Y. ENVTL. CONSERV. LAW § 11-0515 (McKinney 2017)).

162. *Id.*

163. See Chertok et al., *supra* note 1, at 925.

164. No. 945/2018, 2018 N.Y. Slip Op. 30390(U), at 2 (Sup. Ct. Wayne Cty. Mar. 8, 2018).

N.Y.C.R.R. § 617.4.¹⁶⁵ The court further rejected the respondent's argument that this project constituted maintenance, as this type of vegetation removal had not been completed in over sixty years, and determined that it was a Type I action.¹⁶⁶ The respondent then argued that the vegetation removal project was a Type II emergency action pursuant to 6 N.Y.C.R.R. § 617.5(c)(33).¹⁶⁷ Again, the court found the Type II determination to have been arbitrary and capricious, searched the record, and concluded that the project was a Type I action.¹⁶⁸

In *Miranda Holdings, Inc. v. Town Board of Orchard Park*, the Fourth Department upheld a lower court's invalidation of a local law adopting a local Type I action without compliance with SEQRA.¹⁶⁹ There, the lead agency had initially designated the proposal to be an "unlisted action," issued a positive declaration, and required a DEIS.¹⁷⁰ After a request to reclassify as a Type II action, the Town adopted a local law providing that actions involving drive-through windows, including but not limited to restaurants and banks, would be designated as Type I actions under SEQRA.¹⁷¹ The lead agency thereafter adopted a resolution designating the project as a Type I action.¹⁷² The Fourth Department found that this local law was invalid as inconsistent with SEQRA, finding that while the Type II regulations are not explicit, DEC had contemplated that restaurants with drive-through windows would be Type II actions.¹⁷³ Thus, because the regulations dictate that a municipality "may not designate as Type I any action identified as Type II in section 617.5,"¹⁷⁴ "[a] local law that is 'inconsistent with SEQRA' must be invalidated."¹⁷⁵

165. *Id.*

166. *Id.* at 4.

167. *Id.* at 4–5. "[E]mergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to an emergency and are performed to cause the least change or disturbance, practical under the circumstances, to the environment." 6 N.Y.C.R.R. § 617.5(c)(33) (2018).

168. *Town of Pittsford*, 2018 N.Y. Slip Op. 30390(U), at 5.

169. 152 A.D.3d 1234, 1236, 58 N.Y.S.3d 851, 853 (4th Dep't 2017) (first citing *Zutt v. State of New York*, 99 A.D.3d 85, 102, 949 N.Y.S.2d 402, 415 (2d Dep't 2012); and then citing *Omni Partners v. City of Nassau*, 237 A.D.2d 440, 442–43, 654 N.Y.S.2d 824, 826 (2d Dep't 1997); and then citing *Town of Bedford v. White*, 204 A.D.2d 557, 559, 611 N.Y.S.2d 920, 921 (2d Dep't 1994)).

170. *Id.* at 1235, 58 N.Y.S.3d at 852.

171. *Id.*

172. *Id.*

173. *Id.* at 1236, 58 N.Y.S.3d at 852.

174. 6 N.Y.C.R.R. § 617.4(a)(2) (2018).

175. 152 A.D.3d 1234, 1236, 58 N.Y.S.3d 851, 852 (4th Dep't 2017) (citing *Glen Head-Glenwood Landing Civic Council v. Town of Oyster Bay*, 88 A.D.2d 484, 493, 453 N.Y.S.2d 732 (2d Dep't 1982)).

2. Unlawful “Segmentation” of SEQRA Review

Defining the proper boundaries of an action can be a difficult task. SEQRA regulations provide that “[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A].”¹⁷⁶ As explained by the Third Department, impermissible segmentation occurs in two situations: (1) “when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold requiring [SEQRA] review”; and (2) “when a project developer wrongly excludes certain activities from the definition of his project for the purpose of keeping to a minimum its environmentally harmful consequence, thereby making it more palatable to the reviewing agency and community.”¹⁷⁷ Segmentation is not strictly prohibited by SEQRA, but it is disfavored. DEC’s SEQRA regulations provide that a lead agency permissibly may segment review if “the agency clearly states its reasons therefor and demonstrates that such review is no less protective of the environment.”¹⁷⁸ Two cases from this *Survey* period addressed segmentation.

In *Adirondack Historical Ass’n v. Village of Lake Placid/Lake Placid Village, Inc.*, the Third Department found that there was no impermissible segmentation where the Village Board conducted two separate SEQRA reviews resulting in negative declarations that should have been combined due to an inadvertent, good faith mistake.¹⁷⁹ The Village had conducted a SEQRA review for the condemnation of property for the purpose of constructing a parking garage, and conducted a separate review of a broader Main Street redevelopment project that included the subject property.¹⁸⁰ However, the Board had been unaware of the need to exercise its power of eminent domain to condemn the subject property at the time of its SEQRA review of the broader Main Street redevelopment project, and the court found that such segmentation was not impermissible as it was not intended to circumvent the detailed, single review called for under SEQRA.¹⁸¹

176. 6 N.Y.C.R.R. § 617.3(g)(1) (2018).

177. *Schultz v. Jorling*, 164 A.D.2d 252, 255, 563 N.Y.S.2d 876, 879 (3d Dep’t 1990) (citing *Sutton v. Bd. of Tr.*, 122 A.D.2d 506, 508, 505 N.Y.S.2d 263, 265 (3d Dep’t 1986)).

178. *Concerned Citizens for the Env’t v. Zagata*, 243 A.D.2d 20, 22, 672 N.Y.S.2d 956, 958 (3d Dep’t 1998) (citing 6 N.Y.C.R.R. § 617.3(g)(1)).

179. 161 A.D.3d 1256, 1257, 75 N.Y.S.3d 677, 679 (3d Dep’t 2018).

180. *Id.*

181. *Id.* (first citing *Forman v. Tr. of State Univ. of N.Y.*, 303 A.D.2d 1019, 1020, 757 N.Y.S.2d 180, 182 (2003); then citing *Saratoga Springs Preserv. Found. v. Boff*, 110 A.D.3d 1326, 1328, 973 N.Y.S.2d 835, 838 (2013); and then citing *Friends of Stanford Home v. Town of Niskayuna*, 50 A.D.3d 1289, 1290, 857 N.Y.S.2d 249, 251 (2008)).

In *Sandora v. City of New York*, the petitioners sought an injunction against the city-wide homelessness plan, alleging that SEQRA/CEQR review should have been undertaken for the entire plan, and not just for the conversion of the subject premises (to which the petitioners lived in close proximity) to a homeless facility.¹⁸² The Supreme Court, Queens County, held that the de Blasio administration was evidently aware of its responsibilities under CEQR, had indeed conducted review of the subject premises (issuing a negative declaration), and that the impermissible segmentation argument was unavailing because the City's homelessness plan was generalized as to the future location(s) of homeless facilities.¹⁸³ The court also held that the GEIS provisions of SEQRA are inapplicable within the City, as the SEQRA regulations allowing for such a review do not apply to cities with a population of more than one million persons.¹⁸⁴

3. Coordinated Review

One of the procedural requirements of SEQRA is that, for all Type I actions that involve more than one agency, the lead agency must conduct a coordinated review.¹⁸⁵ Under SEQRA regulations, if the "lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no other involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action," and the lead agency's determination of significance "is binding on all other involved agencies."¹⁸⁶ *Troy Sand & Gravel Co. v. Fleming* addressed the interplay between DEC and a Town Board during a coordinated SEQRA review process for a quarry operation in the Town of Nassau.¹⁸⁷ DEC served as lead agency, issued a positive declaration, and ultimately issued affirmative SEQRA findings

182. No. 2740/17, 2017 N.Y. Slip Op. 32065(U), at 3 (Sup. Ct. Queens Cty. Sept. 12, 2017).

183. *Id.* at 6–8.

184. *Id.* at 7–8; see 6 N.Y.C.R.R. § 617.10(b) (2018) (referring to Gen. City § 28-a(4), which does not apply to cities having a population over one million persons, which obviously refers to the City).

185. 6 N.Y.C.R.R. § 617.6(b)(3) (2018). Agencies have the option of conducting a coordinated review for Unlisted Actions, but it is not required. *Id.* § 617.6(b)(4).

186. *Id.* § 617.6(b)(3)(iii) ("If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. The determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies."). When more than one agency is involved, and the lead agency determines that an EIS is required, they must engage in a coordinated review. *See id.* § 617.6(b)(2)(ii).

187. 156 A.D.3d 1295, 1295, 68 N.Y.S.3d 540, 542 (3d Dep't 2017).

and approved the mining permit for the proposed quarry.¹⁸⁸ The Third Department held in an earlier case that, although the Town Board retained authority to undertake an independent review of the quarry applications for a special use permit and site plan approval, the Board was not permitted to evaluate the proposed quarry's potential environmental impacts based on information collected outside of DEC's SEQRA process.¹⁸⁹ The Town Board ultimately denied the project's applications for a special use permit and site plan approval, and the applicant again brought suit.¹⁹⁰ The Supreme Court upheld the denial of the special use permit and site plan applications, and the applicant appealed.¹⁹¹

The Third Department held that "mere acceptance of additional environmental information outside the SEQRA record" does not invalidate the Town Board's determination to deny the special use permit and site plan applications.¹⁹² In contrast, however, the Town Board was required to rely upon DEC's EIS as the basis for its review of the quarry's potential environmental impacts because the Board "is required by the overall policy goals of SEQRA and the specific regulations governing findings made by involved agencies to rely on the fully developed SEQRA record in making the [SEQRA] findings that will provide a rationale for its zoning determinations."¹⁹³ The Third Department held that DEC's SEQRA findings did not bind the Town Board to issue the special use permit or preclude it from applying the standards in its local zoning regulations, including the environmental and neighborhood impacts of the project.¹⁹⁴ In other words, the town Board was restricted to the FEIS in adopting its SEQRA Findings, but could go beyond the FEIS in determining the special permit and site plan applications.

Accordingly, even though the Town Board relied on environmental information outside the SEQRA record and made factual findings without a basis in the FEIS in evaluating special use permit standards, the Third Department did not hold the Town Board's decision to be irrational because the failure to meet even one applicable special use permit standard is a sufficient basis on which to deny a special use permit

188. *Id.* at 1296, 68 N.Y.S.3d at 542–43.

189. *Id.* at 1297, 68 N.Y.S.3d at 543 (citing *Troy Sand & Gravel Co., Inc. v. Town of Nassau*, 125 A.D.3d 1170, 1173, 4 N.Y.S.3d 613, 616 (3d Dep't 2015)).

190. *Id.* at 1297, 68 N.Y.S.3d at 543.

191. *Id.*

192. *Troy Sand & Gravel Co.*, 156 A.D.3d at 1298, 68 N.Y.S.3d at 544.

193. *Id.* at 1300, 68 N.Y.S.3d at 545 (first citing *Troy Sand & Gravel Co. v. Fleming*, 125 A.D.3d, at 1172, 4 N.Y.S.3d at 616 (3d Dep't 2015); and then citing 6 N.Y.C.R.R. § 617.11(d)(1), (3) (2018)).

194. *Id.* at 1303, 68 N.Y.S.3d at 548 (quoting *Troy Sand & Gravel Co.*, 101 A.d.3d at 1507, 957 N.Y.S.2d at 447).

application.¹⁹⁵

E. “Hard Look” Review and the Adequacy of Agency Determinations of Environmental Significance

Agency decisions are accorded significant judicial deference where the petitioners challenge an agency’s conclusions regarding the environmental impacts of a proposal.¹⁹⁶ Courts have long held that “[j]udicial review . . . is limited to ‘whether the agency identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination.’”¹⁹⁷ Under Article 78’s deferential standard of review for agencies’ discretionary judgments, a negative declaration or EIS issued in compliance with applicable law and procedures “will only be annulled if it is arbitrary, capricious or unsupported by the evidence.”¹⁹⁸ Successful challenges to EISs are very uncommon because of this deferential standard of review.¹⁹⁹ Success is relatively more common in challenges to determinations of significance, but as several unsuccessful challenges from the *Survey* period show, even petitioners in such cases face a difficult burden.

1. Adequacy of Determinations of Environmental Significance

The issuance of a negative declaration concludes an agency’s obligations under SEQRA.²⁰⁰ As a result, challenges to a project for which agencies conclude that no EIS is necessary often seek to show that the agency’s issuance of a negative declaration was arbitrary and capricious because, contrary to the agency’s determination, the proposed action may have significant adverse environmental impacts, or that the agency failed to provide a written, reasoned explanation for that

195. *Id.* (citing *Wegmans Enters. v. Lansing*, 72 N.Y.2d 1000, 1001–02, 534 N.Y.S. 372, 373 (1988)).

196. *See, e.g., Riverkeeper, Inc. v. Planning Bd.*, 9 N.Y.3d 219, 232, 881 N.E.2d 172, 177, 851 N.Y.S.2d 76, 81 (2007).

197. *See, e.g., id.* at 231–32, 881 N.E.2d at 177, 851 N.Y.S.2d at 81 (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).

198. *Schaller v. Town of New Paltz Zoning Bd. of Appeals*, 108 A.D.3d 821, 823, 968 N.Y.S.2d 702, 704 (3d Dep’t 2013) (first citing N.Y. C.P.L.R. 7803(3) (McKinney 2008); then citing *Riverkeeper, Inc.*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81; and then citing *Troy Sand & Gravel Co.*, 82 A.D.3d at 1378, 918 N.Y.S.2d at 669).

199. *See generally* MICHAEL B. GERRARD ET AL., ENVTL. IMPACT REVIEW IN N.Y. § 7.04[4] (2018) (discussing the rarity of cases striking down EISs on substantive grounds and the great deference given to administrative agencies when EISs are under review).

200. 6 N.Y.C.R.R. § 617.5 (2018); *see* GERRARD ET AL., *supra* note 199, § 2.01[3][b].

determination (denominated the “reasoned elaboration”).²⁰¹

In one case, the petitioners successfully demonstrated that the lead agency failed to take a “hard look” at the potential adverse traffic impacts of a proposed natural gas compressor facility that would extract gas from the Millennium pipeline and fill trucks for distribution with compressed natural gas.²⁰²

In another case, the Third Department found that a lead agency’s conclusion that traffic impacts could be mitigated with reasonable measures was insufficient to meet the “hard look” test where the “sum total of proof” of the Board’s “hard look” was its “negative response to the question on the EAF as to whether there would be a substantial increase in traffic above present levels—made without articulating a reasoned elaboration for the basis of such determination—and the wholly conclusory statement in its resolution that ‘[t]here is no significant environmental impact that could not be mitigated with reasonable measures.’”²⁰³

The petitioners were also successful *Waterloo Contrs., Inc. v. Town of Seneca Falls Town Board*, where the Seneca Falls Town Board repealed a law that had restricted waste disposal services and provided that operation of solid waste management facilities in the town would be prohibited by 2025.²⁰⁴ The Town Board issued a negative declaration, contending that there would be no potential significant environmental impacts because there would be no change in operation of landfill until 2025, and that post-2025 operations are speculative because regulatory approval would be needed by DEC in the meantime.²⁰⁵ The court held that approval by DEC does not relieve the lead agency’s obligation to take a hard look at the environmental impact of operating the landfill after 2025, and annulled the negative declaration.²⁰⁶

In other reported decisions during the *Survey* period, petitioners were unsuccessful in challenging negative declarations.²⁰⁷ For example,

201. N.Y. C.P.L.R. 7803(3); *see also* Chertok et al., *supra* note 1, at 927. Challenges to positive declarations are less common than challenges to negative declarations. *See* GERRARD ET AL., *supra* note 198, § 3.05[2][e]. Part of the reason is that positive declarations generally are not considered final agency actions.

202. *Chenango Valley Cent. Sch. Dist. v. Town of Fenton Planning Bd.*, 2017 N.Y. Slip Op. 31820(U), at 27 (Sup. Ct. Broome Cty, Aug. 28, 2017).

203. *Adirondack Historical Ass’n v. Vill. of Lake Placid*, 161 A.D.3d 1256, 1259, 75 N.Y.S.3d 677, 681 (3d Dep’t 2018).

204. 2017 N.Y. Slip Op. 31977(U), at 1 (Sup. Ct. Seneca Cty. Sept. 13, 2017).

205. *Id.* at 4.

206. *Id.* at 5–6.

207. *Wir Assoc., LLC v. Town of Mamakating*, 157 A.D.3d 1040, 1046, 69 N.Y.S.3d 130, 136 (3d Dep’t 2018) (first citing *Ellsworth v. Town of Malta*, 16 A.D.3d 948, 950, 792

in *Riverkeeper, Inc. v. New York State Department of Environmental Conservation*, the petitioners challenged the SEQRA review of new permits issued to an electric generating station for thermal discharges into the Hudson River.²⁰⁸ The Third Department affirmed the Supreme Court's dismissal of the suit—it held that the environmental impacts of the station were not new (but rather had been ongoing since the plant first began operation), and that in fact the issuance of the new modified permits would serve to reduce the existing adverse environmental impacts by eliminating coal as a fuel source.²⁰⁹ Thus, DEC satisfied its burden under SEQRA to take the requisite “hard look” when it issued its negative declaration.²¹⁰

Similarly, in *Town of Ellery v. New York State Department of Environmental Conservation*, the petitioners unsuccessfully challenged DEC's SEQRA review in connection with issuance of a permit for the expansion of a county-operated waste management facility where the record established that DEC took the requisite “hard look” at potential impacts on bald eagles.²¹¹

In *Fichera v. New York State Department of Environmental Conservation*, the petitioners challenged a Zoning Board of Appeals determination to grant an area variance for a proposed mining facility; the Fourth Department dismissed the claims, holding that the petitioners were relying on documents and records produced long after DEC made its determination and significance.²¹² “Considering only the ‘facts and records adduced’ before the DEC at the time of its determination,” the court concluded the record established that DEC took the requisite “hard look” and provided a “reasoned elaboration” for the basis of its determination to issue a negative declaration.²¹³

In *Willow Glen Cemetery Ass'n. v. Dryden Town Board*, a solar company sought to construct five 2MW arrays (on a lot that was to be

N.Y.S.2d 227, 230 (3d Dep't 2005); and then citing *Sullivan Farms IV, LLC v. Vill. of Wurtsboro*, 134 A.D.3d 1275, 1280 (3d Dep't 2015)).

208. 152 A.D.3d 1016, 1017–18, 59 N.Y.S.3d 806, 809 (3d Dep't 2017).

209. *Id.* at 1021, 59 N.Y.S.3d at 812.

210. *Id.*

211. 159 A.D.3d 1516, 1517–18, 73 N.Y.S.3d 706, 708–09 (4th Dep't 2018) (citing *Apkan v. Koch*, 75 N.Y.2d 561, 565, 554 N.E.2d 53, 54 (1990)).

212. 159 A.D.3d 1493, 1493, 1495, 1497, 74 N.Y.S.3d 422, 424, 426 (4th Dep't 2018) (first citing *Raritan Baykeeper Inc. v. Martens*, 142 A.D.3d 1083, 1085, 39 N.Y.S.3d 32 (2d Dep't 2016), 35; then citing *Saratoga Springs v. Zoning Bd. of Appeals* 279 A.D.2d 756, 760, 719 N.Y.S.2d 178, 182 (3d Dep't 2001); then citing *Kelly v. Safir*, 96 N.Y.2d 32, 39, 747 N.E.2d 1280, 1284 (2001); and then citing *Featherstone v. Franco*, 95 N.Y.2d 550, 554, 742 N.E.2d 607, 610 (2000)).

213. *Id.* at 1497, 74 N.Y.S.3d at 426 (citing *Kelly*, 96 N.Y.2d at 39, 747 N.E.2d at 1284).

subdivided into five lots in order to take advantage of New York State solar tax benefits) within the Town of Dryden and submitted subdivision, site plan, and special use permit applications.²¹⁴ The Town issued a negative declaration and approved all of the applications; neighborhood opponents challenged the decision, alleging in relevant part that the Town did not take a “hard look” under SEQRA because the negative declaration was issued before the final layout of the lots were determined, and therefore potential visual impacts could not be properly assessed.²¹⁵ The Supreme Court, Tompkins County, dismissed the suit, noting that the review process lasted over six months, included three environmental reports and a visual impact statement, and was reviewed by four other state and federal agencies (DEC, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the New York State Office of Parks, Recreation and Historic Preservation), and no significant concerns were found.²¹⁶ Therefore, the court found that the Town Board had taken the requisite “hard look” and the negative declaration was upheld.²¹⁷

2. Adequacy of Agencies’ EISs and Findings Statements

Petitioners have been generally unsuccessful in challenging the adequacy of EISs during the *Survey* period.²¹⁸ In only one case,

214. 2017 N.Y. Slip Op. 32676(U), at 2–3 (Sup. Ct. Tompkins Cty. Dec. 22, 2017).

215. *Id.* at 11.

216. *Id.* at 11–12.

217. *Id.* at 12.

218. In *Heights of Lansing, LLC v. Village of Lansing*, the Village Board of Trustees rezoned property to high-density residential district. 160 A.D.3d 1165, 1166–67, 75 N.Y.S.3d 607, 609–10 (3d Dep’t 2018). The Third Department held the Board did not violate SEQRA because it held a number of meetings in which the public could comment; took the requisite hard look at the areas of environmental concern; received detailed reports from developer’s consultants including a traffic study, engineering report, and rental housing needs study; and determined that the rezoning would not have a significant environmental impact. *Id.* In *Calverton Manor, LLC v. Town of Riverhead*, the petitioner was engaged in a lengthy ongoing application process, and while application was ongoing, the Town passed new Comprehensive Plan that eliminated certain permitted uses that were key to the petitioner’s application. 160 A.D.3d 829, 830, 76 N.Y.S.3d 75, 77 (2d Dep’t 2018). The petitioner then commenced several related hybrid Article 78 proceedings/plenary actions against Town/Town Board of Riverhead in connection with its plan to construct commercial/residential buildings. *Id.* The petitioner challenged the Town Board’s adoption of a Comprehensive Plan, in relevant part arguing that it failed to comply with the procedural and substantive requirements of SEQRA. *Id.* The Second Department held that the petitioner did not identify any areas where the Town Board failed to comply with procedural aspects of SEQRA. *Id.* at 831, 76 N.Y.S.3d at 78. The court likewise found that the Town Board complied with SEQRA and took a “hard look”—draft and final GEISs discussed mitigation measures, reasonable alternatives to the proposed action, and specific conditions under which future actions will be undertaken/approved in the appropriate level of detail. *Id.* at 831–32, 76 N.Y.S.3d at 78 (quoting *Vill. of Kiryas Joel v. Vill. of Woodbury*, 138 A.D. 1008, 1011, 31 N.Y.S.3d 83, 87 (2d Dep’t 2016)). The Second

Youngewirth v. Town of Ramapo Town Board, did the petitioners prevail.²¹⁹ In that case, a developer sought a rezoning for a parcel to permit development of multifamily units.²²⁰ The Second Department reversed the supreme court's dismissal of the petitioners' suit, finding that the Town Board failed to take a "hard look" at the environmental impact of placing a multifamily development in close proximity to the Columbia natural gas pipeline when it considered the zoning change.²²¹ Because there was no indication in the DEIS, FEIS, or Findings Statement that the Town had considered this potential environmental impact, the Second Department held that the Supreme Court should have annulled the Town Board's determination resolving to approve the Findings Statement for the rezoning.²²²

In our last *Survey*, we updated you on *Friends of P.S. 163, Inc. v. Jewish Home Lifecare* ("Jewish Home"), a case in which the petitioners alleged that the EIS prepared by the New York State Department of Health (NYSDOH) for a nursing home on the Upper West Side of Manhattan was inadequate because it failed to take the requisite "hard look" at noise impacts on students at an adjacent elementary school from construction, even though the EIS complied with the *CEQR Technical Manual*.²²³ During the last *Survey* period, the Appellate Division, First Department reversed the Supreme Court, holding that NYSDOH rationally relied on the *CEQR Technical Manual* and that the record supported the conclusion that NYSDOH "took the requisite 'hard look'" at the noise issue.²²⁴

During this *Survey* period, the Court of Appeals reviewed and

Department therefore affirmed the supreme court's dismissal of petitioner's hybrid action. *Id.* at 832, 76 N.Y.S.3d at 78 (first citing 6 N.Y.C.R.R. § 617.10 (2018); then citing *Eadie v. Town Bd. of Town of N. Greenbush*, 7 N.Y.3d 306, 854 N.E.2d 464, 821 N.Y.S.2d 142 (2006); and then citing *Rusciano & Son Corp. v. Kiernan*, 200 A.D.2d 590, 752 N.Y.S.2d 377 (2d Dep't 2002)).

219. 155 A.D.3d 755, 755, 65 N.Y.S.3d 540, 543 (2d Dep't 2017).

220. *Id.* at 755–56, 65 N.Y.S.3d at 543.

221. *Id.* at 755, 757, 65 N.Y.S.3d at 543, 545.

222. *Id.* at 757–58, 65 N.Y.S.3d at 545.

223. Nos. 100546/15, 100641/15, 2015 N.Y. Slip Op. 51997(U), at 11 (Sup. Ct. N.Y. Cty. Dec. 9, 2015), *rev'd*, 146 A.D.3d 576, 576, 46 N.Y.S.3d 540, 542–44 (1st Dep't 2017); *Chertok et al.*, *supra* note 1, at 864–65.

224. *Friends of P.S. 163, Inc. v. Jewish Home Lifecare*, 146 A.D.3d 576, 579–80, 46 N.Y.S.3d 540, 545 (1st Dep't 2017) (first citing *Finn v. City of New York*, 141 A.D.3d 436, 436, 33 N.Y.S.3d 892, 893 (1st Dep't 2016); and then citing *Chinese Staff & Workers' Ass'n v. Burden*, 88 A.D.3d 425, 429, 932 N.Y.S.2d 1, 3 (1st Dep't 2011)). The court also held that the DOH reasonably relied on federal standards in determining appropriate mitigation for possible off-site migration of lead-bearing dust. *Id.* at 580–81, 46 N.Y.S.3d at 546 (citing *Spitzer v. Farrell*, 100 N.Y.2d 186, 191, 791 N.E.2d 394, 397, 761 N.Y.S.2d 137, 140 (2003)).

affirmed the First Department's decision and its holding that NYSDOH fulfilled its SEQRA responsibilities.²²⁵ The Court of Appeals found that NYSDOH "took the requisite 'hard look,'" and applied the "rule of reason," noting that "not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA."²²⁶ The Court also found that NYSDOH "did not act unreasonably in deciding" upon the required mitigation measures for the project: construction noise reduction measures and a "battery of construction protocols" to contain airborne lead dust.²²⁷

One other case during this *Survey* period addressed reliance on the *CEQR Technical Manual*. In *Brooklyn Heights Ass'n, Inc. v. New York State Urban Development Corp.*, the petitioners alleged that it was improper to rely on the *CEQR Technical Manual's* methodology for assessing potential impacts on the elementary school population.²²⁸ The court dismissed this claim, finding that the respondents took the requisite "hard look" by rationally applying the *CEQR Technical Manual* methodology for assessing elementary school population.²²⁹

F. Supplementation

SEQRA provides for the preparation of an SEIS when project changes, newly discovered information, or changes in circumstances give rise to potential significant adverse environmental impacts not addressed, or not adequately addressed, in the original EIS.²³⁰ "Whether issues, impacts, or project details omitted from an initial EIS require preparation of [a] SEIS is a frequent subject of litigation."²³¹ During this *Survey* period, multiple cases addressed this issue.

In two cases, the Second Department held that the lead agency acted arbitrarily and capriciously in failing to require an SEIS. For example, in *Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Board*, the Second Department affirmed the Supreme Court's holding

225. *Id.* at 424, 90 N.E.3d at 1256, 68 N.Y.S.3d at 385.

226. *Id.* at 430–31, 90 N.E.3d at 1260, 68 N.Y.S.3d at 389 (internal quotations omitted) (quoting *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 417, 494 N.E.2d 429, 436, 503 N.Y.S.2d 298, 305 (1986)).

227. *Id.* at 432–33, 90 N.E.3d at 1261–62, 68 N.Y.S.3d at 390–91.

228. No. 155641/2016, 2018 N.Y. Slip Op. 50211(U), at 16 (Sup. Ct. N.Y. Cty. Feb. 15, 2018).

229. *Id.* at 18, 21 (first quoting *South Bronx Unite! v. N.Y.C. Indus. Dev. Agency*, 115 A.D.3d 607, 610, 983 N.Y.S.2d 8, 12 (1st Dep't 2014); and then quoting *Spitzer*, 100 N.Y.2d at 190, 791 N.E.2d at 397, 761 N.Y.S.2d at 140).

230. 6 N.Y.C.R.R. § 617.9(a)(7) (2018). See discussion *infra* Section III.C.2.

231. Chertok et al., *supra* note 1, at 865 (internal quotations omitted).

that the Planning Board failed to comply with SEQRA when it made its determination that an SEIS was not required after the applicant changed a portion of the project to include a large delicatessen than previously planned and the addition of sixteen gas pumps.²³² The court noted that even though an agency has discretionary review over whether to require an SEIS, in making its determination it must consider the environmental issues and make “an independent judgment that they would not create a significant [adverse] environmental impact.”²³³ In *Green Earth Farms*, the project changes, including the installation of gas pumps, were not even mentioned in the lead agency’s resolution that an SEIS was not required; thus, the Second Department held that the Planning Board failed to take the requisite “hard look” in assessing whether an SEIS was necessary.²³⁴

In *Shapiro v. Planning Board of the Town of Ramapo*, the petitioners contended that an SEIS was required in connection with a housing development to assess the impact of the proposed development on wetlands where at the time of the adoption of the Findings Statement and project approval, the Army Corps of Engineers had not issued a formal jurisdictional determination as to the presence and extent of federally regulated wetlands.²³⁵ Under those circumstances, the Second Department held the Planning Board could not have taken a “hard look” at the wetlands impacts, and the court remitted the matter to the Planning Board for preparation of an SEIS fully assessing the presence of any federally regulated wetlands on the subject property.²³⁶

In other cases during this *Survey* period, the courts found that an SEIS was not required. For example, in one case, the court found an SEIS was not required for an amendment to a stormwater management system

232. 153 A.D.3d 823, 827–28, 60 N.Y.S.3d 381, 386 (2d Dep’t 2017).

233. *Id.* at 828, 60 N.Y.S.3d at 386 (quoting *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 234 n.2, 881 N.E.2d 172, 179, 851 N.Y.S.2d 76, 83 (2007)) (first citing *Riverkeeper, Inc.*, 9 N.Y.3d at 231, 881 N.E.2d at 176, 851 N.Y.S.2d at 80; and then citing *Penfield Panorama Area Cmty., Inc. v. Town of Penfield Planning Bd.*, 253 A.D.2d 342, 349–50, 688 N.Y.S.2d 848, 853 (4th Dep’t 1999)).

234. *Id.* (first citing *Penfield*, 253 A.D.2d at 349–50, 688 N.Y.S.2d at 853; then citing *Dickinson v. Cty. of Broome*, 183 A.D.2d 1013, 1014, 583 N.Y.S.2d 637, 638 (3d Dep’t 1992); then citing *Riverkeeper*, 9 N.Y.3d at 229–31, 233–35, 881 N.E.2d at 175–76, 178–80, 851 N.Y.S.2d at 79–80, 82–84; and then citing *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 429–30, 494 N.E.2d 429, 444, 503 N.Y.S.2d 298, 313 (1986)).

235. 155 A.D.3d 741, 744, 65 N.Y.S.3d 54, 58 (2d Dep’t 2017).

236. *Id.* at 745–46, 65 N.Y.S.3d at 59 (first citing *Bronx Comm. for Toxic Free Schs. v. N.Y.C. Sch. Constr. Auth.*, 20 N.Y.3d 148, 155, 981 N.E.2d 766, 769, 958 N.Y.S.2d 65, 68 (2012); then citing *Falcon Grp. Ltd. Liab. Co. v. Town/Vill. of Harrison Planning Bd.*, 131 A.D.3d 1237, 1239, 17 N.Y.S.3d 469, 472 (2d Dep’t 2015); and then citing *Bronx Comm. for Toxic Free Schs.*, 20 N.Y.3d at 155–56, 981 N.E.2d at 769–70, 958 N.Y.S.2d at 68–69).

where such changes would have no adverse environmental impacts and would in fact have a positive environmental effect.²³⁷

In *Viserta v. Town of Wawayanda Planning Board*, the Planning Board approved a site plan for a power plant in 2013.²³⁸ The applicant filed amended permit applications in 2015, and project opponents contended that the Planning Board should require an SEIS for these amendments.²³⁹ “The Planning Board determined that no SEIS was necessary, and approved the amended application.”²⁴⁰ Ultimately, the applicant decided that it would proceed under the original approved plan, and project opponents alleged that an SEIS was still required.²⁴¹ The Second Department held that the need for an SEIS is not based solely on an amendment application, but rather on an analysis of whether newly-discovered information regarding the project’s potential impact on habitat and human health necessitated supplemental review; thus, the mere withdrawal of the amendment application did not render the suit academic.²⁴² However, the court found that the Planning Board had discretion to review the potential project impacts, and it was not arbitrary and capricious for the Planning Board to review the project and newly-discovered information and determine that no substantial changes would occur.²⁴³ Therefore, no SEIS was required.²⁴⁴

In *Brooklyn Heights Ass’n Inc. v. N.Y.S. Urban Dev. Corp.*, the Supreme Court, New York County, addressed the merits of the petitioners’ claim that the increased financial strength of the Brooklyn Bridge Park Corporation was a “change in circumstances” necessitating an SEIS because at the time of the adoption of the FEIS for the Brooklyn Bridge park project (ten years prior), smaller and less-dense development alternatives were not considered financially feasible.²⁴⁵ The petitioners

237. Comm. for a Sustainable Waterfront v. Planning Bd. of Glen Cove, N.Y.L.J., at 2–3, 6–7 (Sup. Ct. Nassau Cty. Oct. 16, 2017).

238. 156 A.D.3d 797, 797, 68 N.Y.S.3d 94, 95 (2d Dep’t 2017).

239. *Id.* at 797, 68 N.Y.S.3d at 95–96.

240. *Id.* at 797, 68 N.Y.S.3d at 96.

241. *Id.* at 797–98, 68 N.Y.S.3d at 96.

242. *Id.* at 798, 68 N.Y.S.3d at 96 (first citing 6 N.Y.C.R.R. § 617.9(a)(7)(i)(b) (2018); and then citing *In Def. of Animals v. Vassar Coll.*, 121 A.D.3d 991, 992, 994 N.Y.S.2d 412, 413 (2d Dep’t 2014)).

243. *See Viserta v. Town of Wawayanda Planning Bd.*, 156 A.D.3d 797, 798–99, 68 N.Y.S.3d 94, 97 (2d Dep’t 2017) (citing *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 9 N.Y.3d 219, 231, 881 N.E.2d 172, 176, 851 N.Y.S.2d 76, 80 (2007)).

244. *Id.* at 798, 68 N.Y.S.3d at 96 (citing *Riverkeeper*, 9 N.Y.3d at 232, 881 N.E.2d at 177, 851 N.Y.S.2d at 81).

245. No. 155641/2016, 2018 N.Y. Slip Op. 50211(U), at 15–16 (Sup. Ct. N.Y. Cty. Feb 15, 2018) (first citing *Develop Don’t Destroy (Brooklyn), Inc. v. Empire State Dev. Corp.*, 33 Misc. 3d 330, 342, 346–47, 927 N.Y.S.2d 571, 581, 584 (Sup. Ct. N.Y. Cty. 2011); and then

argued that the “change in circumstances” language of SEQRA was intended as a broad, “catch-all” provision” that would encompass changed financial circumstances.²⁴⁶ The respondents had produced a technical memorandum assessing whether there was a need for an SEIS and concluded that there was not.²⁴⁷ The respondents argued that the technical memorandum, which “analyzed project changes, new information, and changed circumstances” before it reached its conclusion that an SEIS was not warranted, was an adequate basis on which to uphold the determination that an SEIS was not required.²⁴⁸ Otherwise, such would give rise to “a cycle of constant updating, followed by further review and comment periods, [which] would render the administrative process perpetual and subvert its legitimate objectives.”²⁴⁹

The court dismissed the petitioners’ claims in their entirety, holding that agencies have considerable discretion in conducting their evaluations and their determinations not to undertake a supplemental environmental review.²⁵⁰ The respondents were not required to consider improved economics in the area as a “change in circumstances” because the “newly-discovered information” “must be based on the importance and relevance of the information and the present state of the information in the EIS.”²⁵¹ “[T]he financial condition of the neighborhood was not part of the initial SEQRA review[;]” finances are not within the scope of SEQRA review because they are not environmental in nature; and SEQRA does not require applicants to consider additional alternatives to the project in light of financial changes.²⁵² Regarding elementary school population changes, the court held the technical memo rationally applied the methodology in the *CEQR Technical Manual*; the lead agency’s finding that an SEIS was not required because the project increased the

citing 6 N.Y.C.R.R. § 617.9(a)(7)(i) (2018)). See discussion *infra* Part III(E)(2) for a discussion of *Brooklyn Heights Ass’n* in the context of reliance on the *CEQR Technical Manual*.

246. *Id.* at 43–44 (citing *Mobil Oil Corp.*, 224 A.D.2d at 22, 646 N.Y.S.2d at 748).

247. *Id.* at 5–6 (citing *Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 223, 799 N.Y.S.2d 205, 212 (1st Dep’t 2005)).

248. *Id.* at 15.

249. *Id.* (internal quotations omitted) (citing *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 425, 494 N.E.2d 429, 441, 503 N.Y.S.2d 298, 310 (1986)).

250. *Brooklyn Heights Ass’n.*, 2018 N.Y. Slip Op. 50211(U), at 18 (first citing *Brooklyn Bridge Park Legal Def. Fund, Inc. v. N.Y. State Urban Dev. Corp.*, 50 A.D.3d 1029, 1031, 856 N.Y.S.2d 235, 237 (2d Dep’t 2008); then citing *Riverkeeper*, 9 N.Y.2d at 231, 881 N.E.2d at 177, 851 N.Y.S.2d at 81; and then citing *Green Earth Farms Rockland, LLC v. Town of Haverstraw Planning Bd.*, 153 A.D.3d 823, 827, 60 N.Y.S.3d 381 (2d Dep’t 2017)).

251. *Id.* at 61 (quoting *Shapiro v. Planning Bd. of the Town of Ramapo*, 155 A.D.3d 741, 743–44, 65 N.Y.S.3d 54, 57 (2d Dep’t 2017)) (citing 6 N.Y.C.R.R. § 617.9(a)(7)(i)(c) (2018)).

252. *Id.* at 21.

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elementary school population by less than 5% was not irrational; and the memo properly concluded that the project would not result in any additional significant adverse impacts not previously identified in the FEIS.²⁵³

Finally, in *Commission for a Sustainable Waterfront v. Planning Board of Glen Cove*, the petitioners alleged that changes to the Garvies Point Project's (a large, mixed-use waterfront development) stormwater management system necessitated preparation of an SEIS.²⁵⁴ The court held that the mere changed circumstances of a project were not sufficient to require an SEIS; the changes must actually give rise to one or more potential significant adverse environmental impacts not previously addressed.²⁵⁵ Here, because the changes to the stormwater system actually constituted improvements that would lessen the project's environmental impact, the court held that no SEIS was required.²⁵⁶

CONCLUSION

Case law from this *Survey* period demonstrates that SEQRA continues to present the courts with difficult legal questions related to standing, ripeness, and the statute of limitations; procedural issues, including segmentation and coordinated review; the adequacy of agencies' determinations of significance; the sufficiency of agencies' EISs and Findings Statements; and supplementation. These issues will continue to evolve as the courts are presented with new SEQRA challenges. SEQRA practitioners will find themselves in an adjustment period as the new SEQRA regulations go into effect. These and other developments in the law of SEQRA will be covered in future installments of the *Survey of New York Law*.

253. *Id.*

254. 2017 N.Y.L.J. LEXIS 3031, at 2 (Sup. Ct. Nassau Cty. 2017).

255. *Id.* at 5.

256. *Id.*